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C. Noncompliance with notice-of-claim statute, § 893.80, is an affirmative defense to be asserted in an answer and not a jurisdictional prerequisite to filing suit against a governmental entity

D. On motion to dismiss alleging defenses in § 802.06(2)(a)6., 8., or 9., if matters outside the pleadings are presented to and not excluded by Ct, motion may be treated as one for summary judgment under § 802.08, and all parties shall be given reasonable opportunity to present all pertinent materials

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B. A document is considered filed on a particular day if the submission is completed by 11:59 p.m. Central Time, as recorded by the e-filing system, so long that it is subsequently accepted by the clerk of Ct upon review. Documents filed after 11:59 p.m. are considered filed the next day the clerk's office is open. The expanded availability of time to file shall not affect the calculation of time under other statutes, rules, and Ct orders

C. For documents not requiring personal service, the e-filing system will generate a notice of activity. This constitutes effective service

D. An electronic notification that cannot be successfully delivered shall be returned to the clerk of Ct. If the clerk cannot contact the user to update the information, the user shall be treated as a paper party until the party corrects the problem

E. Initiating documents such as a summons and complaint, petition, application, citation, criminal complaint, notice of appeal, or other document filed to commence a Ct action shall be served by traditional methods unless the responding party has consented in writing to accept electronic service

F. To be considered electronically signed, a document must be submitted by or on behalf of a user through the e-filing system. A document requiring the signature of a user shall bear either an electronic signature or a handwritten signature applied to a document before it is imaged. Either form of signature shall be treated as the user's personal original signature under statutes and Ct rules

G. A stipulation will be considered signed by multiple persons if it bears the handwritten signature of all signatories or if it bears the printed name of each signatory and contains a representation by the filing party that the filing party has consulted with the signatories and all have agreed to sign the document. Sec. 801.18(12)(g)2. does not apply to the signature requirements of § 809.107(2)(bm)6., (5)(a), or (6)(f) (in TPR appeals), if a signature is required from the appellant or petitioner, other than the State, on whose behalf the document is filed

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C. Explore possibility of obtaining admissions or stipulations

D. Make evidentiary rulings, including limitations on use of experts under § 907.02

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C. Motions must be brought on 5 days' notice, unless ex parte motion for order shortening time is granted

D. All records, papers, and affidavits supporting motion shall be served with notice of motion and motion

2..... Amendment of Pleadings

A. Once as a matter of course within 6 months after filing summons and complaint or per scheduling order; thereafter, need permission of Ct or consent of adverse parties

B. An amended pleading may relate back to date of filing of original complaint, provided specific statutory requirements are met and no unfairness or prejudice results

C. When motion to amend is filed after summary judgment has been granted, no presumption exists to allow amendment

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B. Not a discovery device like old "bill of particulars"

C. Properly granted when party required to make a responsive pleading cannot reasonably do so because other party's pleading is so vague and ambiguous

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A. To admit or bar expert testimony is within Ct's discretion

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A. Upon the filing of this motion, all discovery and other proceedings shall be stayed for 180 days or until the Ct rules on the motion, unless the Ct finds good cause on the motion of any party that particularized discovery is necessary

B. May be made after issue joined and within time so as not to delay the trial

C. If matters outside pleadings are presented, motion treated as summary-judgment motion under § 802.08

D. Addresses only legal issues

2..... Motion to Dismiss

A. Upon the filing of this motion, all discovery and other proceedings shall be stayed for 180 days or until the Ct rules on the motion, unless the Ct finds good cause on the motion of any party that particularized discovery is necessary

B. Voluntary dismissal without Ct order

C. Dismissal with Ct order

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B. Motion should not be argued in presence of jury

C. Ct not entitled to substitute its judgment or impression for those determinations normally reserved to jury

D. Motion for directed verdict not granted is not waiver of trial by jury, even though all parties have moved for directed verdict

4..... Effect of Granting Motion

A. Any dismissal operates as adjudication on merits, unless Ct otherwise specifies for good cause recited in order for dismissal

B. Reviewing Ct gives substantial deference to Trial Ct's ruling on directed verdict and should not reverse grant of motion unless "clearly wrong"

5..... Amending Pleadings to Conform to Proof

A. Ct has authority to amend pleadings even after testimony closed to conform to proof

CV 17: CLOSING ARGUMENT

1..... Scope and Purpose

A. Purpose of closing argument is to give Attys an opportunity to summarize to jury why it should draw favorable inferences from evidence

B. Attys should be entitled to reasonable latitude in argument and in commenting on evidence

C. Rebuttal limited to matters raised by any adverse party in argument

D. Verbatim record of closing argument must be made

2..... Right to Open and Order of Argument

A. Plaintiff entitled to open argument and give final rebuttal argument

B. Waiver of argument by either party shall not preclude adverse party from making any argument that party otherwise would have been entitled to make

C. When there is no contest of plaintiff's claim, but there is contest as to Def's counterclaim, side with affirmative burden may open and close

D. GAL has right to argue facts to jury at fact-finding stage

3..... Control by Court

A. Ct may limit time for argument before argument is begun

B. Reversal based on Ct's control of argument will not be granted absent erroneous exercise of discretion that affected jury verdict

C. Ct should promptly and forcefully rule on any objection to improper remark and immediately instruct jury to disregard the remark

D. Content of argument to jury is matter within discretion of Ct

E. Improper arguments include

CV 18: JURY INSTRUCTIONS

1..... Preliminary Instructions

A. Judge may give preliminary instructions, which may again be given in charge at close of evidence

B. If preliminary instructions to be given, should be done after jury selected and before opening statements

2..... Curative Instructions

A. A curative instruction is one that is designed to correct an error

B. A Judge must instruct jury on specific case-related instructions as soon as considered necessary

C. Presumption that curative instruction erases any prejudice

D. Improper remarks or evidence incapable of correction by curative instruction may require mistrial

3..... Instruction Conference

A. Judge must hold instruction conference in absence of jury at close of evidence and before arguments to jury

B. At conference, Judge must inform Attys on the record of proposed action on

C. Failure to object at conference on the record constitutes a waiver of any error in proposed instructions

D. Party's written motion may refer to standard Wis JI-Cv instructions

4..... Final Instructions

A. Ct may instruct jury either before or after closing arguments

5..... Reinstruction

A. Jury may request further instruction after final instructions and during deliberation

B. Before reinstructing, Judge must see that Attys are notified and present, unless

6..... Responsibility of Ct

A. To clearly and concisely state to jury issues and applicable principles of law necessary to correctly resolve the lawsuit

B. To give correct instructions notwithstanding absence of request from or objections by Attys

C. There will be times when model instruction not available or appropriate

D. Trial Cts have wide discretion in deciding what instructions will be given, as long as they fully and fairly inform the jury of the principles of law applicable to the particular case

E. Usually reversible error to inform jury, either directly or impliedly of the ultimate effects of its answer

7..... Responsibility of Attys

A. Request

B. Objections

8..... Form, Scope, and Order of Instruction

A. Should be short, concise, and directly to point

B. Should be complete, clear, and direct statement of law applicable to case free from obscurity or argumentation

C. Error to refuse to instruct on material issue raised by evidence or to give instruction on issue that has no support in evidence

D. Standard of review is erroneous exercise of discretion not de novo review

9..... Sending Jury Instructions to Jury Room

A. Judge to provide jury with complete set of written instructions providing “substantive” law to be applied and applicable burden of proof (except in traffic regulation cases and small claims actions)

10..... Admonition to Jury on Recess

A. “Jurors, I now caution you not to discuss this case with anyone, not even among yourselves, until this case is submitted to you for your final deliberations in the jury room, and you are then to discuss it only among yourselves in the jury room”

CV 19: VERDICTS

1..... Forms of Verdict

A. General verdict

B. Special verdict

C. Formulation of special verdict

2..... Verdicts in Specific Cases

A. Negligence

B. Medical malpractice

C. Informed consent

D. Statutory duties

E. Products liability

3..... 5/6 Rule

A. The same 10 (5) jurors must agree on answer to every question necessary to sustain a judgment on the verdict, not all questions

B. If too many dissenters

4..... Inconsistent or Perverse Verdict

A. Inconsistent verdict

B. Perverse verdict

C. If inconsistent verdict not remedied by resubmission to jury and not properly subject to waiver of claim, new trial required

D. Failure of party to assert inconsistency at return of verdict and request that verdict be resubmitted to jury does not constitute waiver of right to object to verdict on posttrial motions

E. If Ct grants posttrial motion based on claim of inconsistent verdict

F. Ct may always reserve ruling on motion for directed verdict made before submission of verdict to jury and rule on motion following return of verdict

5..... Receiving the Verdict

A. Verdict received in open Ct

B. Ct should examine verdict to determine whether it conforms to the 5/6 rule, that it is consistent and not perverse

C. If jury fails to affirm verdict on a poll, declare mistrial or return jury for further deliberation

D. Ct may only interrogate jurors to determine if irregularities occurred if charge is made on knowledge of one who is not a juror

E. Not legal duty of Ct to see that Attys are present at rendition of verdict

6..... Entry of Judgment

A. Judgment should not be entered until motions after verdict have been decided

7..... Impeaching the Verdict

A. See Motions After Verdict, CV 20, Sec. 3.E.

CV 20: MOTIONS AFTER VERDICT

1..... Motion for Judgment on the Verdict

A. Motion for judgment on the verdict not required

B. If no motion after verdict filed within time specified in § 805.16, judgment entered on verdict

C. If motion after verdict timely filed, judgment on verdict entered upon denial of motion or expiration of 90 days

2..... Postverdict Motions Challenging Verdict or Legal Effect of Verdict

A. Time requirements

B. Motion for directed verdict or dismissal

C. Motion for judgment notwithstanding verdict (JNOV)

D. Motion to change answer

E. Motion for new trial

3..... Entitlement to New Trial: Case and Statutory Supplementation Based on Particular Grounds Asserted

A. Excessive or inadequate verdicts

B. Verdict contrary to law or weight of evidence

C. Newly discovered evidence

D. Interest of justice

E. Impeachment of verdict because of jury misconduct

F. Specific instances of alleged juror misconduct

CV 21: BENCH TRIAL

1..... Jurisdiction

A. No constitutional right to jury in equitable actions

B. Right to jury trial for statutory cause of action

C. Jury may be waived

D. Ct trial may be waived

2..... Findings of Fact

A. Ct must find ultimate facts, which are not evidentiary facts, but those on which plaintiff’s right of recovery necessarily depends

B. Findings of fact may be

C. No findings of fact necessary when judgment entered in accordance with terms of stipulation settling litigation

D. Findings of fact must be made within 60 days after submission of cause

E. Responsibility for correctness of findings of fact on Judge

F. Motion to dismiss at close of plaintiff’s case

3..... Conclusions of Law

A. Conclusions are drawn by Ct in exercise of its legal judgment from facts found by it

B. Must be stated separately from findings of fact

C. On questions of law, appellate Ct not bound by interpretation, but due consideration given

4..... Reconsideration, Amendment, and Additional Findings

A. Motion to reconsider must be made within 20 days after entry of judgment

B. Motion to reconsider may be made with motion for new trial

C. If motion not decided within 90 days after entry of judgment, deemed denied

D. Factors to consider

5..... Appeal

A. Sufficiency of evidence to support findings may be raised on appeal whether or not party has objected in Ct or moved for new trial

B. Findings of fact will not be set aside, unless clearly erroneous

C. Judge is ultimate arbiter of credibility of witnesses

D. Inferences drawn by Judge from credible evidence binding on Appellate Ct

E. Motion for reconsideration extends time for appeal

CV 22: DAMAGES

1..... Types of Damages Available

A. Compensatory

B. Nominal

C. Punitive

D. Atty Fees

2..... Contract

A. Damages limited by concepts of

B. Damages generally available

C. Measure of damages for selected actions

3..... Torts

A. Damages for certain causes of action

B. Negligence actions generally

C. Selected negligence actions

D. Tort claims against gov't subdivisions, officers, or employees

4..... Economic Loss Doctrine

A. Judicially created remedies principle that precludes contracting parties from pursuing tort recovery for purely economic or commercial losses associated with contractual relationship

B. Policies

C. Recovery in tort of "economic damages" barred

D. Economic damages are losses attributable to product itself or monetary losses caused by the defective product. Includes

E. Does not bar commercial purchaser's claim based on personal injury or damage to property other than product or on economic losses that are alleged in combination with noneconomic losses

F. Exceptions to application of doctrine

5..... Mitigation

A. Torts

B. Breach of contract or tort actions re: Property damages

C. Trial Ct has discretion to admit proof or lack of mitigation at variance with pleadings and amend pleadings to conform to proof

6..... Damages for Wrongful Death

A. Secs. 895.03 and 895.04 only apply when death occurs in State of Wis

B. Measure: Generally, loss to survivors

C. Wrongful death cause of action is purely statutory; no common-law right exists

D. Recovery

E. Punitive damages may not be awarded in wrongful death action

7..... Rules for Multiple Defs

A. Apportion damages to separate injuries suffered in same transaction according to harm from each

B. When injury/damage caused by successive Defs, damages apportioned

C. As a general rule, when there is a logical basis to allocate damages between two or more incidents and among various parties, Cts should do so

D. Inseparability of damages does not create joint liability of successive tortfeasors

CV 23: COSTS

1..... Generally

A. Shall be allowed to plaintiff upon recovery

B. Shall be allowed to Def if plaintiff not entitled

C. Multiple parties each entitled to recover costs

D. Trial Ct has "inherent power" beyond statutory authority to impose costs as sanction

2..... Costs and Fees That Are Recoverable

A. Mandatorily recoverable costs—"All the necessary disbursements and fees allowed by law," including

B. Items of costs not specifically referred to in statute are not recoverable

C. Atty fees

3..... Offers of Judgment/Settlement

A. Sec. 807.01 employs 3-step methodology

B. Offer by Def of judgment to plaintiff in certain amount

C. Offer by Def of amount of damages to be assessed against Def should Def fail in defense of liability at trial

D. Offer of settlement to Def by plaintiff of damages plus costs

E. Offer must clearly state settlement

F. Effectiveness of types of offers on statutory provisions of § 807.01

G. § 807.01 does not apply to arbitration cases

4..... Taxation of Costs

A. Objections to items of costs must be in writing and state reasons for objections

B. Perfection of judgment by taxation of costs

C. Does not apply to Ch 102

D. Actual costs allowed

CV 24: FRIVOLOUS ACTIONS

1..... Damages for Maintaining Frivolous Claims

A. Party or party's Atty may be liable for costs and Atty fees for commencing, using, or continuing action, special proceeding, counterclaim, defense, cross-complaint, or appeal to which any of the following applies:

B. Section 895.044 does not apply to

C. Motion may be made at any time during the proceedings or upon judgment

D. Motion and hearing notice must be served on unrepresented party by personal service or registered mail only

E. Violation must be proved by clear and convincing evidence

F. Available remedies upon proven violation

G. If award is upheld on appeal, on remand, Trial Ct must award actual reasonable Atty fees incurred by successful party on appeal

H. Award may be assessed fully against party or Atty, or against both, jointly and severally or by apportionment

2..... Signatures and Representations to Court

A. Signature

B. Certification

3..... Purposes for Section 802.05

A. Deterrence is now the primary purpose. See infra Sec. 6.B.2)

B. Compensation “may” be awarded

C. Punishment

D. To maintain integrity of judicial system and legal profession

4..... Initiating Section 802.05 Motion for Sanctions

A. Notice by parties

B. Notice by Court

C. When available

D. When not available

E. Retroactive application

5..... Opportunity to Respond

A. Hearing discretionary

6..... Sanctions

A. Order awarding sanctions must make specific findings

B. Ct has broad discretion

C. Limits on award of sanctions

D. Factors bearing on sanctions

E. Party seeking sanctions has duty to mitigate its costs and fees

CV 25: JUDGMENTS/RELIEF FROM JUDGMENT

JUDGMENTS

1..... Judgment Is the Determination of the Action

A. Specifies relief granted or other determination

B. Name and place of residence of each party to the action must be included

C. In special proceedings, the determination is an order

2..... Judgment May Be Final, Interlocutory, or Partial

A. Final judgment or order

B. Interlocutory judgment substantially disposes of merits of controversy but leaves a ministerial fact-finding function remaining

C. Partial judgment involves one or more of several parties

3..... Default Judgments

A. Party entitled to default judgment if no responsive pleadings within time allowed by law

B. Default judgment may be rendered if

C. If Def fails to appear within time fixed in § 801.09, Ct shall require proof of service of summons as required by § 801.10 before entering judgment

D. Default judgment may be rendered against any party who has appeared in the action but who fails to appear at trial

E. Issue preclusion (collateral estoppel) can apply to facts found in default judgment

F. Default-judgment statute is available to parties on counterclaim and cross-claim effective January 1, 2019

G. Procedure for entry of default judgment by Ct

H. Entry of default judgment by Clerk of Ct

I. Costs

4..... Judgment on Admitted Claim

A. Action on express contract for liquidated sum—Alternatives

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A. Judgment rendered when signed

B. Judgment entered when filed in Clerk of Ct's office

C. Judgment perfected by taxation of costs and amount inserted in judgment

D. Judgment granted when given orally in open Ct on the record

RELIEF FROM JUDGMENT

1..... Purpose and Standard

A. To achieve balance between finality and fairness

B. Remedial and liberally construed

C. Discretionary determination

2..... Grounds

A. Ct may relieve party or legal representative, including a prevailing party, from judgment, order, or stipulation for the following reasons

3..... Procedure

A. Motion made to Ct granting judgment or order

B. By Ct, sua sponte, with notice to parties and opportunity to be heard

C. Independent equitable action

4..... Limitations

A. Motion under § 806.07 does not affect finality of judgment or suspend its operation

B. Relief from judgment entered in Ch 227 review may not be granted under § 806.07

C. Does not apply to setting aside verdict

5..... Relief Pending Appeal

A. Motion for stay of enforcement pending appeal must be supported by specific facts through affidavit

B. Trial Ct may issue stay of enforcement of a judgment pending appeal upon consideration of following factors (See also Sec. C., infra, for considerations specific to stay of solely a money judgment)

C. Trial Ct may issue stay of enforcement of solely a money judgment pending appeal upon consideration of following nonexclusive factors

D. Undertaking for costs not generally required unless specifically required by statute or by Trial Ct acting in its discretion

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IN MEMORIAM

RONNI G. JONES

April 12, 1941—November 7, 2002

The Wisconsin Judicial Benchbooks have borne the imprint of their Project Editor, Ronni Jones, since 1988 when Ronni first assumed this task for the Office of Judicial Education. In that time, the judges and lawyers of this state have benefited from her focused dedication to the creation and maintenance of a useful, practical resource for Wisconsin's trial judges. And those of us who had the good fortune to know and to work with Ronni have benefited from the friendship and collegiality of this vibrant, witty, and generous woman.

Ronni brought to her work a fierce intelligence and a logical and discerning approach to solving problems. Along with it came a marvelous sense of humor and a dry wit served up with a trace of a Brooklyn accent. Ronni was the genuine article. It was fun to see her discuss a case or a legal issue with a group. She was energized by the intellectual discussion, but always with a purpose; she unfailingly kept her eye on the practical goal of how the end product could be used to assist judges.

Ronni's commitment to judicial education is perhaps not surprising. When she entered law school at the age of 42, she had already combined raising a family with a history of work in training and education, and a track record of commitment to volunteerism and public service. She was married for 40 years to P. Charles Jones, a bright and thoughtful Dane County judge who was himself a longtime member of the Civil Benchbook Committee. And she loved a challenge.

Warmth and humor infused Ronni's relationships with the people she knew and worked with. She was gracious and unpretentious, encouraging and delighting in conversation whether around the conference table or the dinner table. She was a facilitator in the best sense of the word; she wanted to include everyone in the discussion or in the gathering or in the party.

Ronni loved her work but more so the abiding friendships developed in the course of her work. We remember her with gratitude as a judicial educator who helped to make us better judges. And we remember her with fondness as a friend who, along the way, helped to make us better people.

The Wisconsin Judicial Benchbook Editorial Committees
April 15, 2003

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USER'S GUIDE AND ABBREVIATIONS

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Citation Abbreviations

A2d	Atlantic Reporter, 2nd series
ABA Stds	American Bar Association Standards
ALR	American Law Reports
ALR2d	American Law Reports, 2nd series
ALR3d	American Law Reports, 3rd series
ALR4th	American Law Reports, 4th series
Am Jur	American Jurisprudence
Am Jur 2d	American Jurisprudence, 2nd series
CJ	Corpus Juris
CJS	Corpus Juris Secundum
Const	Constitution
Cr L	Criminal Law Reporter
F	Federal Reporter
F2d	Federal Reporter, 2nd series
F3d	Federal Reporter, 3rd series
FRBP	Federal Rules of Bankruptcy Procedure
FRCP	Federal Rules of Civil Procedure
FRCrP	Federal Rules of Criminal Procedure
FRE	Federal Rules of Evidence
FS	Federal Supplement
IRC	Internal Revenue Code
LEd2d	Lawyers Edition, 2nd series
OAG	Attorney General Opinion
P2d	Pacific Reporter, 2nd series
Pin	Pinney's Wisconsin Reports
RMC	Records Management Committee
SCR	Wisconsin Supreme Court Rules
St	State
SW2d	South Western Reporter, 2nd series
USC	United States Code
USCA	United States Code Annotated
Wis Adm Code	Wisconsin Administrative Code
Wis JI-Cr	Wisconsin Jury Instructions, Criminal
Wis JI-Cv	Wisconsin Jury Instructions, Civil
Wis JI-Cr, SM	Wisconsin Jury Instructions, Criminal, Special Materials

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Text Abbreviations

AG	Attorney General
AOD	Alcohol and Other Drugs
AODA	Alcohol and Other Drugs Abuse
Asst	Assistant
Atty	Attorney
AV	Audiovisual
Bd	Board
CHIPS	Child in Need of Protection or Services
Ch	Chapter
CMV	Commercial Motor Vehicle
Co	Company
Comm'r	Commissioner
Corp	Corporation
Ct	Court
Cty	County
DA	District Attorney
Def	Defendant
Dept	Department
DHFS	Department of Health and Family Services (formerly DHSS)
DWD	Department of Workforce Development (formerly DILHR)
DOA	Department of Administration
DOC	Department of Corrections
DOT	Department of Transportation
DL	Driver's License
FCC	Family Court Commissioner
GAL	Guardian ad Litem
Gdnshp	Guardianship
ICJ	Interstate Compact on Juveniles
ICPC	Interstate Compact on the Placement of Children
ICWA	Indian Child Welfare Act
Ins	Insurance
Juv	Juvenile
Prelim	Preliminary Hearing, Preliminary Examination
PSI	Presentence Investigation, Presentence Report
PD, SPD	State Public Defender
S	State
Std	Standard
TPR	Termination of Parental Rights
UCCJEA	Uniform Child Custody Jurisdiction and Enforcement Act
UIM	Underinsured Motorist
UM	Uninsured Motorist
US	United States
Wis	Wisconsin

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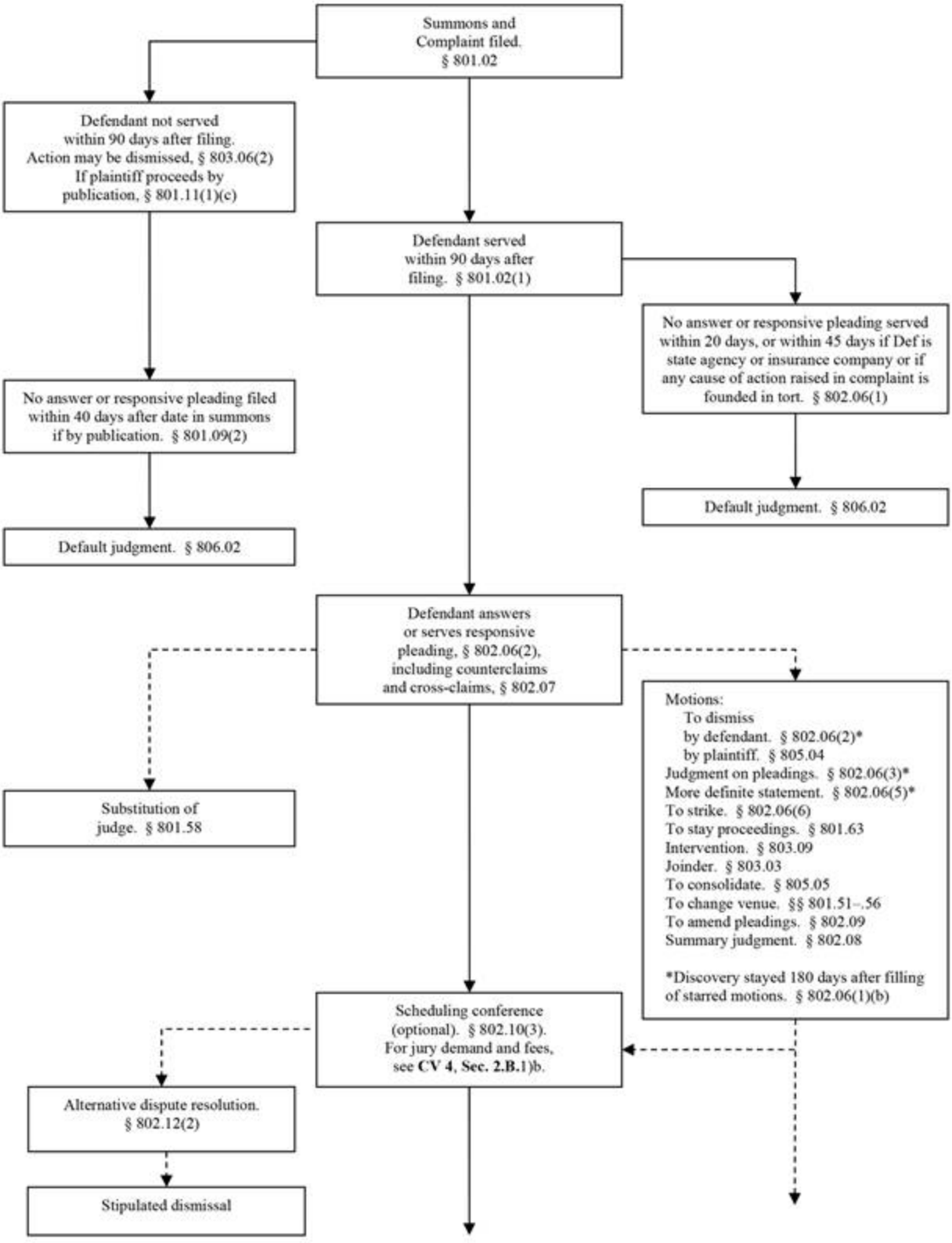
CV 1: CIVIL PROCESS FLOWCHART

Civil Process


Summons and Complaint filed. § 801.02
Defendant not served within 90 days after filing. Action may be dismissed, § 803.06(2) If plaintiff proceeds by publication, § 801.11(1)(c)
Defendant served within 90 days after filing. § 801.02(1)
No answer or responsive pleading served within 20 days, or within 45 days if Def is state agency or insurance company or if any cause of action raised in complaint is founded in tort. § 802.06(1)
No answer or responsive pleading filed within 40 days after date in summons if by publication. § 801.09(2)
Default judgment. § 806.02
Default judgment. § 806.02
Defendant answers or serves responsive pleading, § 802.06(2), including counterclaims and cross-claims, § 802.07
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Motions:
To dismiss
by defendant. § 802.06(2)*
by plaintiff. § 805.04
Judgment on pleadings. § 802.06(3)*
More definite statement. § 802.06(5)*
To strike. § 802.06(6)
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To change venue. §§ 801.51–.56
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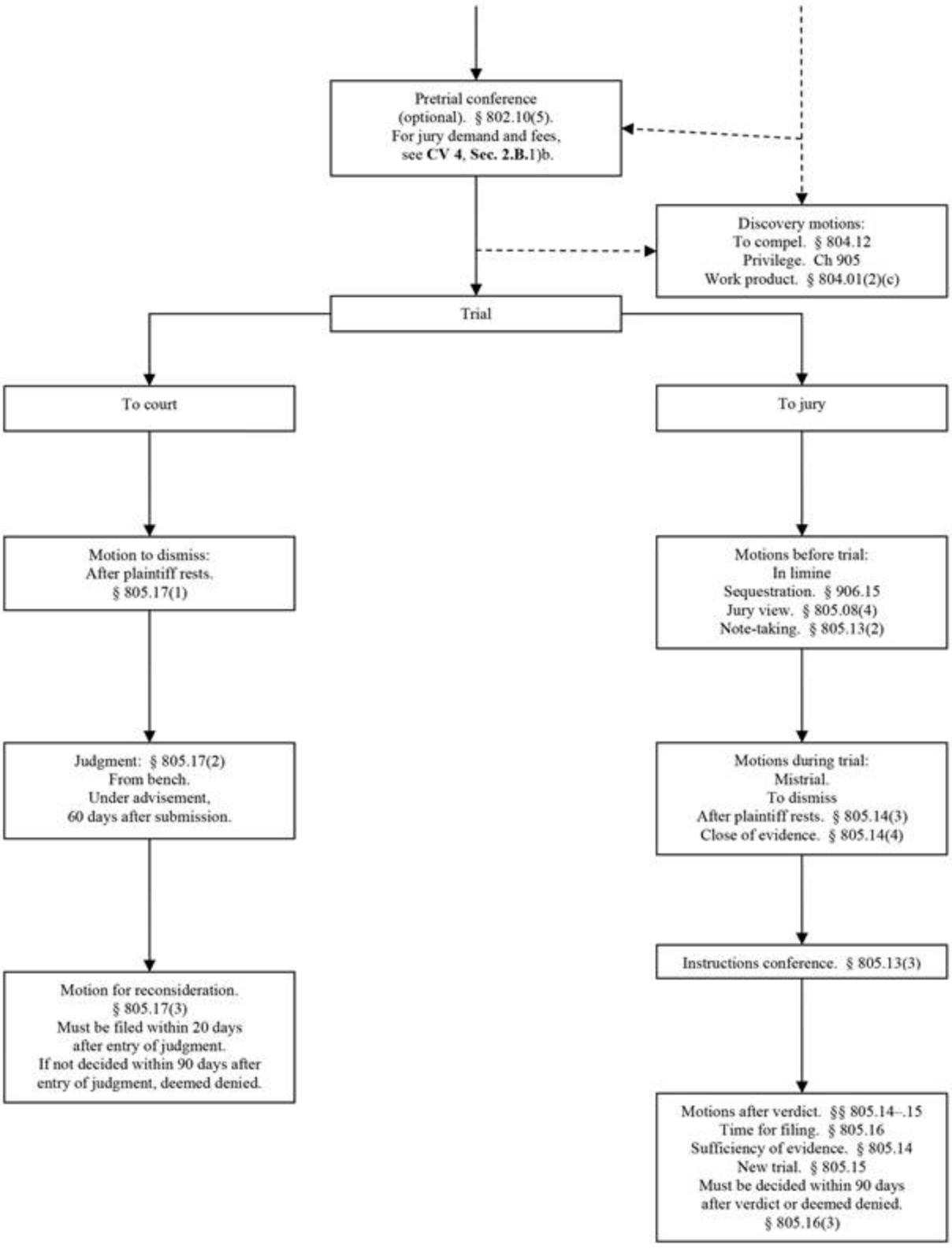
Summary judgment. § 802.08
*Discovery stayed 180 days after filling of starred motions. § 802.06(1)(b)
Scheduling conference (optional). § 802.10(3). For jury demand and fees, see CV 4, Sec. 2.B.1)b.
Alternative dispute resolution. § 802.12(2)
Stipulated dismissal

Flowchart



CV 2: COMMENCEMENT OF ACTION

NOTE: If an attorney, or a party if appropriate, has consented in writing to accept service by email, service may be made via email to that person's primary or other designated email address. Email service is complete upon transmission, except if the sender receives notification or indication that the message was not delivered. *See* § 801.14(2).

1. Summons and Complaint

A. Commencement

§§ 801.02(1), 893.02
Lak v
Richardson-Merrell, Inc
100 Wis. 2d 641, 649
(1981)

1) Civil action commenced when summons and complaint filed with Clerk of Ct, provided service made within 90 days after filing

Northern Air Servs, Inc v
Link
2011 WI 75, ¶ 11 n4
336 Wis. 2d 1

a. Filed with Clerk of Ct means properly deposited

- *Link* overruled *Granado v Sentry Ins,* 228 Wis. 2d 794 (Ct. App. 1999), regarding a clerk's discretion in accepting filings after hours. The Supreme Ct favors the bright-line rule from *St John's Home of Milw v Cont'l Cas Co*, 150 Wis. 2d 37 (1989) (limiting Supreme Ct clerk's discretion), which prospectively applies to Circuit Ct clerks after *Link*: documents received after hours will be treated as having been filed on the following day

§ 801.15(2)(a)

b. 90-day period may not be enlarged under any circumstances

B. Service of process

§ 801.11
Danielson v
Brody Seating
71 Wis. 2d 424, 429
(1976)

1) Service of summons in manner prescribed by statute is condition precedent to valid exercise of personal jurisdiction

2) Summons

§ 801.09

a. Content

§ 801.095

b. Form

Dungan v Cty of Pierce
170 Wis. 2d 89
(Ct. App. 1992)
Canadian Pac, Ltd v
Omark-Prentice
Hydraulics, Inc
86 Wis. 2d 369
(Ct. App. 1978)

c. Defects in content or form of summons generally considered technical and do not automatically deprive Ct of jurisdiction

§ 801.09(4)

d. Authentication

Studelska v Avercamp
178 Wis. 2d 457, 464
(Ct. App. 1993)

- Failure to serve party with properly authenticated summons and complaint generally considered fundamental defect that deprives Ct of personal jurisdiction

Am Fam Mut Ins Co v
Royal Ins Co
167 Wis. 2d 524, 534
(1992)

- However, if authentication defect is attributable to clerk's error and is beyond plaintiff's control, it may be deemed technical

Mahoney v Menard, Inc
2011 WI App 128
337 Wis. 2d 170

- If complaint filed with Ct is signed, then authenticated, unsigned complaint served on Def is mere technical, not fundamental, defect

§ 801.14(2)
Bell v Employers
Mut Cas Co
198 Wis. 2d 347
(Ct. App. 1995)

e. Amended summons—When personal jurisdiction over Def obtained by proper service of original, amended summons and complaint may be served on Def's Atty

§ 801.14(1)
Holman v
Family Health Plan
227 Wis. 2d 478 (1999)
Ness v Digital
Dial Commc'ns, Inc
227 Wis. 2d 592 (1999)

f. Amended complaint

Schuett v Hanson
2007 WI App 226, ¶ 8
305 Wis. 2d 729

- Amendments effective upon service on Def, not filing with Ct

- Must be served on all parties not in default at time of filing

- Must be filed with Ct within reasonable time

§ 801.14

3) Orders, motions, and other papers

§ 801.14(2)
Varda v General Motors
2001 WI App 89
242 Wis. 2d 756

a. If party represented by Atty, service to be made on Atty

§ 801.14(2)

b. Service on Atty is not sufficient for contempt motions

§ 801.14(2m)

c. If Atty has filed limited appearance under § 802.045(2) on behalf of otherwise-unrepresented person, anything that must be served under § 801.14(1) must be served on both that person and Atty (until Atty files notice of termination under § 802.045(4))

4) Manner of service

§ 801.10(1)
Bendimez v Neidermire
222 Wis. 2d 356
(Ct. App. 1998)

a. Persons who may serve—Adult resident, not a party, of state where service made

§ 801.10(1m)

- An adult who is not a party who resides in Illinois, Michigan, Iowa, or Minnesota may serve an authenticated copy of summons in Wis

§ 801.11(1)

b. Individual—Personal service by actual delivery to Def preferred method

§ 801.11(1)(b)
West v West
82 Wis. 2d 158 (1978)
Haselow v Gauthier
212 Wis. 2d 580
(Ct. App. 1997)
Welty v Heggy
124 Wis. 2d 318
(Ct. App. 1985)

- Substituted service permitted if with reasonable diligence Def cannot be served personally—requires pursuit of leads or information reasonably calculated to make personal service possible

§§ 801.11(1)(c), 985.02

- Publication permitted if with reasonable diligence Def cannot be served personally or by substituted service

West v West
82 Wis. 2d 158, 165
(1978)

- Whether reasonable diligence standard satisfied is factual inquiry

§ 801.11(6)
CH2M Hill, Inc v
Black & Veatch
206 Wis. 2d 370
(Ct. App. 1996)

c. Partnership—all general partners should be served in same manner as individuals

Carmain v
Affiliated Capital Corp
2002 WI App 271, ¶ 16
258 Wis. 2d 378

- Service on limited partnership may be made on registered agent or Dept of Financial Institutions

§§ 801.11(5), 180.0504

d. Corporations

- Served on person "apparently in charge"

Richards v
First Union Sec
2006 WI 55
290 Wis. 2d 620
Horrigan v
State Farm Ins Co
106 Wis. 2d 675, 683
(1982)
Keske v Square D Co
58 Wis. 2d 307, 313
(1973)

— "Apparently in charge" refers to what is apparent to process server

Hagen v City of
Milwaukee Emp's Ret Sys
Annuity & Pension Bd
2003 WI 56
262 Wis. 2d 113

— Service must be made on person in Def's *actual* office

Bar Code Res v
Ameritech Info Sys
229 Wis. 2d 287
(Ct. App. 1999)

- Determination of what is "the office of such officer, director, or managing agent" is objective question

Richards v
First Union Sec
2006 WI 55, ¶¶ 33, 34
290 Wis. 2d 620

— Managing agent

§ 801.11(3), (4)

e. Governmental body

Hagen v City of
Milwaukee Emp's Ret Sys
Annuity & Pension Bd

2003 WI 56
262 Wis. 2d 113

- Service must be made on person apparently in charge of Def's *actual* office

DOT v Peterson
226 Wis. 2d 623, 633
(1999)
cf All Star Rent A Car v
DOT, 2006 WI 85, ¶ 41
292 Wis. 2d 615
Mayek v Cloverleaf Lakes
Sanitary Dist
2000 WI App 182
238 Wis. 2d 261

- When statute defining procedure to review governmental action is ambiguous, challenge to service will be resolved in favor of plaintiff

§ 807.12
Lavine v Hartford
Accident & Indem Co
140 Wis. 2d 434
(Ct. App. 1987)

f. Party designated by fictitious name

§ 801.02

- Plaintiff has 90 days after filing against fictitious Def to establish the name of the true Def and serve true Def

5) Service outside Wisconsin

§ 801.11(1)(b)2.

a. Within US—Personal service, substituted service, or service by publication may be used, including substituted service as permitted in other state

20 UST 361,
TIAS No 6638
Vause v Vause
140 Wis. 2d 157, 162
(Ct. App. 1987)

b. Outside US—Hague Convention provides nonexclusive mechanism

Conservatorship of Prom
v Sumitomo Rubber
Indus, Ltd
224 Wis. 2d 743
(Ct. App. 1999)

- Hague Convention only preempts state law on service if there is conflict

C. Challenge to service

1) See also **Dispositive Motions**, **CV 6, Sec. 2.D.**

§ 802.06(2), (8)(a)
Honeycrest Farms, Inc v
Brave Harvestore Sys

200 Wis. 2d 256
(Ct. App. 1996)

2) Must be raised by motion, before pleading, or in responsive pleading or deemed waived

§ 806.02
Honeycrest Farms, Inc v
AO Smith Corp
169 Wis. 2d 596
(Ct. App. 1992)

May also be raised as response to motion for default judgment or in motion for relief from judgment under certain circumstances

§ 801.08(1)

3) Challenges to service are objections to Ct's personal jurisdiction and must be heard before any issue going to merits

Am Fam Mut Ins Co
v Royal Ins Co
167 Wis. 2d 524, 533
(1992)

4) Initial burden on plaintiff to prove service was sufficient

Honeycrest Farms, Inc v
AO Smith Corp
169 Wis. 2d 596, 603
(Ct. App. 1992)

a. Affidavit of service or sheriff's certificate of service containing all information required by § 801.10(4)(a) creates rebuttable presumption of proper service

St v Boyd
2000 WI App 208
¶¶ 21–24,
238 Wis. 2d 693

- Averment on "knowledge and belief" sufficient

St v
One 1997 Ford F-150
2003 WI App 128
265 Wis. 2d 264

- Requirements of statute may be stated in many ways so long as found in four corners of affidavit

b. Burden then shifts to Def to rebut presumption by clear and satisfactory proof

Dietrich v Elliott
190 Wis. 2d 816, 826
(Ct. App. 1995)

c. Nature of proof within discretion of Trial Ct

Gehr v City of Sheboygan
81 Wis. 2d 117, 122
(1977)

d. Fact of service, not form of proof of service, gives Ct jurisdiction over party

Mech v Borowski
116 Wis. 2d 683, 686
(Ct. App. 1983)

e. Strict compliance with requirements of § 801.11 necessary; substantial compliance not enough

Burnett v Hill
207 Wis. 2d 110 (1997)
Gaddis v
LaCrosse Prods, Inc
198 Wis. 2d 396 (1996)

5) Defect in service may be either technical or fundamental

Am Fam Mut Ins Co
v Royal Ins Co
167 Wis. 2d 524 (1992)

a. If deemed technical, action not dismissed unless Def prejudiced

Dungan v Cty of Pierce
170 Wis. 2d 89, 98
(Ct. App. 1992)

- Plaintiff has burden to show defect is technical and did not prejudice Def

Burnett v Hill
207 Wis. 2d 110 (1997)

b. If deemed fundamental, defect deprives Ct of personal jurisdiction

- Lack of prejudice and actual notice are irrelevant

Dungan v Cty of Pierce
170 Wis. 2d 89, 93
(Ct. App. 1992)

c. Determination whether defect is technical or fundamental is question of law

Gaddis v
LaCrosse Prods, Inc
198 Wis. 2d 396, 407
(1996)

d. No bright-line rule as to which defects are technical and which are fundamental

Burnett v Hill
207 Wis. 2d 110 (1997)
Jadair Inc v
US Fire Ins Co
209 Wis. 2d 187, 208
(1997)

- Approach should be pragmatic with focus on purpose of statutory requirement not met and type of action involved

e. Generally, defects in content or form of summons under §§ 801.09(1)–(3) or 801.095 are deemed technical

Gaddis v
LaCrosse Prods, Inc
198 Wis. 2d 396 (1996)

- Failure to sign summons served with signed complaint

Canadian Pac, Ltd v
Omark-Prentice
Hydraulics, Inc
86 Wis. 2d 369
(Ct. App. 1978)

- Omission from summons that Def must answer within 20 days (or within 45 days if Def is State agency or insurance company or if any cause of action raised in complaint is founded in tort)

Dungan v Cty of Pierce
170 Wis. 2d 89
(Ct. App. 1992)

- Failure of Atty to sign summons to identify self as Atty

f. Generally, defects in compliance with requirements of § 801.02 for commencement of action are deemed fundamental

Am Fam Mut Ins
v Royal Ins Co
167 Wis. 2d 524 (1992)

- Service of unauthenticated photocopy of authenticated copy of summons and complaint

Mech v Borowski
116 Wis. 2d 683
(Ct. App. 1983)

- Service of unauthenticated copy of summons or service before filing

§ 801.09
Bulik v Arrow Realty, Inc
148 Wis. 2d 441
(Ct. App. 1988)

- Failure to name party served as a Def in summons

§ 802.05(1)
Schaefer v Riegelman
2002 WI 18
250 Wis. 2d 494

- Signature on pleading of non-Wis Atty, even if authorized by Wis Atty

Town of Dunkirk
v City of Stoughton
2002 WI App 280
258 Wis. 2d 805

- Signature on pleading of suspended Wis Atty

Johnson v
Cintas Corp No 2
2012 WI 31
339 Wis. 2d 493

- Failure to identify correct Def in summons and complaint

§ 802.05(1)
Rabideau v Stiller
2006 WI App 155, ¶ 15
295 Wis. 2d 417

g. Defect consisting of failure to sign a complaint does not deprive Ct of jurisdiction if promptly cured under § 802.05(1)

h. All defects in the manner in which service is accomplished are fundamental

6) See **Dispositive Motions, CV 6, Sec. 2.E.** for challenges to personal or subject-matter jurisdiction

2. Answer

§ 801.09(2)(a)
§ 802.06(1)(a)

A. Def must serve answer within 20 days after service of summons and complaint, if personal or substituted service

§ 801.09(2)(a)
§ 802.06(1)(a)

EXCEPT service within 45 days allowed if Def is State agency or insurance company or if any cause of action raised in complaint is founded in tort

§ 801.09(2)(b)

B. Def must serve answer within 40 days after date stated in summons, if publication used

§ 801.14(4)
Split Rock Hardwoods, Inc. v Lumber Liquidators, Inc
2002 WI 66
253 Wis. 2d 238

C. Def must also *file* answer with Ct within reasonable time after service

3. Affirmative Defenses

A. Every defense except those specified in § 802.06(2) must be asserted in the responsive pleading if one is required

B. Sec.

802.06(2) defenses can be asserted by motion instead of in a responsive pleading at the option of the pleader. If by motion, such defense must be made before the responsive pleading if a further pleading is permitted

Maple Grove Country Club, Inc v Maple Grove Ests Sanitary Dist
2019 WI 43, ¶ 36
386 Wis. 2d 425

C. Noncompliance with notice-of-claim statute, § 893.80, is an affirmative defense to be asserted in an answer and not a jurisdictional prerequisite to filing suit against a governmental entity

§ 802.06(2)(b)

D. On motion to dismiss alleging defenses in § 802.06(2)(a)6., 8., or 9., if matters outside the pleadings are presented to and not excluded by Ct, motion may be treated as one for summary judgment under § 802.08, and all parties shall be given reasonable opportunity to present all pertinent materials

4. Counterclaims/Cross-Claims

§ 802.07

A. General permissive rule; parties may choose time and place to assert their claims

Menard v Liteway Lighting Prods
2005 WI 98, ¶ 28
282 Wis. 2d 582
Adler v D&H Indus Inc
2005 WI App 43, ¶ 15
279 Wis. 2d 472

B. Compulsory if all elements of claim preclusion are present and judgment in second suit would undermine the initial judgment or impair legal rights of the plaintiff established in the initial action

5. Venue

Stelling v Middlesex Ins Co
2023 WI App 10, ¶ 26
406 Wis. 2d 197
pet to rev denied

A. Sec.

801.50(2) is the default. A party may choose among the options listed in (a)–(c), and if none apply, choose (d), unless a specific venue enumerated in statute

B. Specific venue requirements are found in § 801.50(3)–(5v) and also contained in other statutes (*see, e.g.*, §§ 655.009(3), 185.44(2), 779.20, and 799.11)

§ 801.51

C. Motion for change of venue as a matter of right

1) Timing. Must be made before the first motion or responsive pleading in the action or upon a showing that, despite reasonable diligence, the party did not discover grounds for a motion to challenge venue when or before serving the party's first motion or responsive pleading

Stelling v Middlesex Ins Co
2023 WI App 10, ¶ 53
406 Wis. 2d 197
pet to rev denied

2) Multiple Defs. If venue is proper as to any Def, then no change of venue is available as a matter of right; in other words, a challenge to venue can be successful only if venue is improper as to all Defs

Stelling v Middlesex Ins Co
2023 WI App 10, ¶ 35
406 Wis. 2d 197
pet to rev denied

3) Def does "substantial business" in Cty under § 801.50(2)(c) when extent of Def's various commercial activities and business relationships, of any type, conducted or occurring at least in part in Cty at issue, considered in isolation or relative to Def's total commercial activity and business relationships, is considerable

§ 801.52

D. Discretionary change of venue

1) Cannot be exercised unless Ct has proper venue under § 801.50(2)

2) Timing. Can be made at any time on motion of the Ct or any party

6. Effect of e-Filing

§ 801.15(5)(b)

A. Whenever a party has the right or is required to do some act or take some proceeding within a prescribed period after service of a notice or other paper upon the party, if the notice or paper is served by fax, by email, or by e-filing system under § 801.18 and such transmission is completed between 5:00 p.m. and midnight, one day shall be added to the prescribed period

§ 801.18(4)(am)

B. A document is considered filed on a particular day if the submission is completed by 11:59 p.m. Central Time, as recorded by the e-filing system, so long that it is subsequently accepted by the clerk of Ct upon review. Documents filed after 11:59 p.m. are considered filed the next day the clerk's office is open. The expanded availability of time to file shall not affect the calculation of time under other statutes, rules, and Ct orders

§ 801.18(6)(a)

C. For documents not requiring personal service, the e-filing system will generate a notice of activity. This constitutes effective service

§ 801.18(6)(e)

D. An electronic notification that cannot be successfully delivered shall be returned to the clerk of Ct. If the clerk cannot contact the user to update the information, the user shall be treated as a paper party until the party corrects the problem

§ 801.18(5)(d), (1)(j)

E. Initiating documents such as a summons and complaint, petition, application, citation, criminal complaint, notice of appeal, or other document filed to commence a Ct action shall be served by traditional methods unless the responding party has consented in writing to accept electronic service

§ 801.18(12)(a)

F. To be considered electronically signed, a document must be submitted by or on behalf of a user through the e-filing system. A document requiring the signature of a user shall bear either an electronic signature or a handwritten signature applied to a document before it is imaged. Either form of signature shall be treated as the user's personal original signature under statutes and Ct rules

§ 801.18(12)(g)2.

G. A stipulation will be considered signed by multiple persons if it bears the handwritten signature of all signatories or if it bears the printed name of each signatory and contains a representation by the filing party that the filing party has consulted with the signatories and all have agreed to sign the document. Sec. 801.18(12)(g)2. does not apply to the signature requirements of § 809.107(2)(bm)6., (5)(a), or (6)(f) (in TPR appeals), if a signature is required from the appellant or petitioner, other than the State, on whose behalf the document is filed

CV 3: SUBSTITUTION AND DISQUALIFICATION

1. Substitution of Judge

§ 801.58(1)

A. Time for filing request

St v Matthews
(In re Commitment
of Matthews)
2021 WI 42
397 Wis. 2d 1
St ex rel Sielen v Cir Ct
176 Wis. 2d 101 (1993)
Pure Milk Prods Coop
v NFO
64 Wis. 2d 241 (1974)

1) Before any contested preliminary matters heard, or right to substitution waived

a. If request made by plaintiff, it must be made no later than 60 days after summons and complaint are filed

§ 801.58(1)

b. If by any other party, request must be made no later than 60 days after service of summons and complaint on that party

Comment

2) 60-day time limitation pertinent only when there are no immediate contested proceedings

a. Uncontested proceedings do not constitute bar and thus interlocutory order entered on stipulation, by default or by consent does not preclude later request for substitution

Comment

b. Since judicial assignments trigger additional substitution rights, Judges should exercise restraint over voluntary disqualification shortly before trial

§ 801.58(1)

3) If new Judge assigned, request must be made within 10 days after receipt of notice of assignment

St ex rel Laborers Int'l
Union of N Am v Cir Ct
112 Wis. 2d 337
(Ct. App. 1983)

a. Notice must be actual as opposed to constructive

b. If assignment is less than 10 days before trial, request must be made within 24 hours after notice

c. If notice of assignment less than 24 hours before trial, action cannot proceed without stipulation of parties

St ex rel Strong v Cir Ct
184 Wis. 2d 223
(Ct. App. 1994)

d. Except if newly elected or appointed Judge, 10 days from date of swearing in

City of La Crosse
v Jiracek Cos
108 Wis. 2d 684, 695
(Ct. App. 1982)

4) Party added after Judge has heard a preliminary contested matter may file a request

a. Within 60 days after served with summons and complaint

St ex rel Serocki v Cir Ct
163 Wis. 2d 152 (1991)
DeWitt Ross & Stevens v Galaxy Gaming & Racing
2003 WI App 190, ¶¶ 39–43
267 Wis. 2d 233,
aff'd in part, rev'd in part on other grounds,
2004 WI 92
273 Wis. 2d 577

b. Unless party united in interest, *see infra* **Sec. B.**, participated in the preliminary matter

§ 801.58(3)
St ex rel Cincinnati Ins Co v Cir Ct for Milwaukee Cty
2003 WI 57
262 Wis. 2d 99

B. Parties united in interest and pleading together may file only one substitution

Village of Tigerton v Minniecheske
211 Wis. 2d 777
(Ct. App. 1997)

Substance of interest rather than form of pleadings controls

§ 801.58(1)
St ex rel Tarney v McCormack
99 Wis. 2d 220, 233
(1980)

C. Procedure

1) Written request required

a. Must be signed by party or Atty for party

Comment

b. No particular formality required, provided document can be determined to be a request

§ 801.58(1)

2) Requesting party shall serve a copy on all parties to the action as provided in § 801.18(6)(a) or (c)

§ 59.40
Kroll v Bartell (In re Civil Contempt of Kroll)
101 Wis. 2d 296, 300
(Ct. App. 1981)

3) Request must be filed with Clerk of Ct or Deputy Clerk

a. Clerk shall immediately contact named Judge for determination of request

§ 801.58(2)

b. If no determination made within 7 days, Clerk shall forward request to Chief Judge of Judicial Administrative District for action

§ 801.58(2)

4) Denial of request is reviewable

a. Written request for review must be filed with Clerk within 10 days after denial

Barbara RK v James G (Paternity of Danielle LG)
2002 WI App 47
250 Wis. 2d 667

b. Reviewed by Chief Judge of Judicial Administrative District

- Only as to time or proper form

St ex rel JH Findorff & Son, Inc v Cir Ct for Milwaukee Cty
2000 WI 30, ¶¶ 32–35,
233 Wis. 2d 428

c. Chief Judge lacks authority to review a decision to *grant* substitution request

d. Reviewed by Chief Judge of adjoining Judicial Administrative District if Judge named in review is Chief Judge

§ 752.02
St ex rel James LJ v Cir Ct
200 Wis. 2d 496 (1996)

e. Ct of Appeals can review Chief Judge's action by supervisory writ

Petitioner v Evans
2018 WI App 53
383 Wis. 2d 669

5) Method of assignment

Chief Judges may develop and adopt methods for assigning substitute judges that do not involve personal involvement by the Chief Judge

D. Judicial obligations

§ 801.58(2)

1) Named Judge must determine whether request is timely and in proper form

§ 801.58(2)

2) If request is timely and in proper form

a. Named Judge has no further jurisdiction over case

b. Clerk of Ct shall request assignment of new Judge under § 751.03

Petitioner v Evans
2018 WI App 53, ¶ 11
383 Wis. 2d 669

c. Assignment is made by Chief Judge of Judicial Administrative District. Chief Judge may develop and adopt methods for assigning substitute judges that do not involve Chief's personal involvement

d. New Judge shall proceed under § 802.10(1)

§ 801.58(2m)

e. Any ex parte order granted by original Judge remains in effect according to the terms, except that certain TROs are extended until new Judge holds injunction hearing. New Judge can hear motions to modify or vacate original Judge's ex parte order

Comment

3) Judges should not routinely acquiesce to requests for substitution

a. Have affirmative duty to determine whether request in proper form and timely

b. Unless both criteria are met, request should be denied

§ 801.58(3)

E. Limitations

1) Only one request allowed to each party under § 801.58(3), except one additional request after appeal allowed under § 801.58(7). *See infra* **Sec. G.**

2) Parties in interest are one party for substitution purposes

a. One party may file request without consent of others

Comment

b. Request filed by party after similar request by another party in interest is not timely

3) Request may not name more than one Judge

Bahr v Galonski
80 Wis. 2d 72, 86 (1977)

4) Substitution barred in proceedings to modify divorce judgments regarding support and custody orders

St ex rel Tarney v McCormack
99 Wis. 2d 220, 233 (1980)

a. Applies only to cases in which Judge has previously heard contested matters

b. Not applicable when Judge merely signed an order issued by Circuit Ct Comm'r

§ 801.58(4)

F. Reinstatement of Judge

1) Substituted Judge can be reinstated by filing of agreement including all parties, former Judge, and new Judge

Comment

2) Even though one party may request substitution and therefore bar other parties in interest, all parties must join in agreement for reinstatement

§ 801.58(7)

G. Substitution following appeal

1) If further proceedings in Trial Ct are necessary after appeal that reverses or modifies judgment or order as to any or all parties, then any other party may request substitution under § 801.58(1)

St ex rel Ondrasek
v Cir Ct
133 Wis. 2d 177
(Ct. App. 1986)

2) Substitution right is unqualified when further proceedings ordered on remand, unless remand for specific action

St ex rel JH Findorff
& Son v Cir Ct
2000 WI 30
233 Wis. 2d 428

a. "Further proceedings" involve exercise of discretion

b. "Specific action" requires no exercise of discretion; duty is ministerial

c. Discretion contemplates process of reasoning

Rohl v St
97 Wis. 2d 514 (1980)

3) Request must be within 20 days after filing of remittitur in Trial Ct, and in addition to other requests that may have been filed before time of appeal or writ of error

Bahr v Galonski
80 Wis. 2d 72 (1977)
Bacon v Bacon
34 Wis. 594 (1874)

4) Substitution rule does NOT apply in divorce cases on remand or for modification—*Bacon–Bahr* rule

2. Disqualification of Judge

A. Definitions

§ 757.19(1)

1) "Judge" includes Supreme Ct Justices, Ct of Appeals Judges, Circuit Ct Judges, and Municipal Judges

§ 757.19(2)

2) Grounds for mandatory disqualification

a. Related to party, Atty, or spouse of either within 3rd degree of kinship

- Sec. 990.001(16) sets forth rules for computing kinship

b. Judge is party or material witness, unless Judge determines pleading purporting to make Judge party is false

Sturdevant v St
49 Wis. 2d 142, 145
(1970)

c. Judge has previously acted as Atty for party in same action now pending before Ct

d. Judge prepared, as Atty, any legal instrument whose validity or construction is at issue

e. Appellate Judge has previously handled matter while Judge of inferior Ct

Clarke v
Wis Elections Comm'n
2023 WI 66
409 Wis. 2d 249

f. When Judge has significant financial or personal interest in outcome

- Such interest does not occur solely by Judge being member of political or taxing body that is a party

g. Judge determines for any reason Judge cannot, or it appears Judge cannot, act impartially

Comment

- Highly discretionary ground, which should be used with restraint

Comment
City of Edgerton
v Gen Cas Co
190 Wis. 2d 510 (1995)

B. Sua sponte-disqualification required if any of foregoing grounds exist

Judge must disqualify self immediately when disqualifying facts first become known

§ 757.19(6)

C. Sanctions for failure to disqualify self

1) All legal remedies available in specific statutes

2) Referral to Judicial Commission of Supreme Ct

§ 757.19(3)
City of Edgerton
v Gen Cas Co
190 Wis. 2d 510 (1995)

D. Waiver of sua sponte disqualification allowed, provided

1) All parties and Judge agree, and

2) Full and complete record of factors creating disqualification is made

3. Disqualification of Judge for Bias or Impartiality

Wis Voters Alliance
v Reynolds
2023 WI App 66, ¶ 35
410 Wis. 2d 335
St v Goodson
2009 WI App 107, ¶ 8
320 Wis. 2d 166

A. It is presumed Judges act fairly, impartially, and without bias, but that presumption is rebuttable. To overcome that presumption, the burden is on the party asserting judicial bias to show bias by a preponderance of the evidence. To determine whether impartiality has been rebutted, two tests are applied, one subjective and one objective. A Circuit Ct Judge's impartiality is reviewed de novo

SCR 60.04
St v Asfoor
75 Wis. 2d 411, 436
(1977)
St v Rochelt
165 Wis. 2d 373, 379
(Ct. App. 1991)

1) The subjective test is the Judge's personal assessment, when referring to the Supreme Ct rule regarding impartiality, whether so biased as to be impartial in the case. Judge should recuse self if Judge has any doubt as to ability to preside impartially or if Judge believes impartiality can be reasonably questioned. A Trial Judge's declaration that he or she is not biased satisfies the subjective test

Miller v Carroll
(In re Paternity of BJM)
2020 WI 56
392 Wis. 2d 49
St v Goodson
2009 WI App 107, ¶ 9
320 Wis. 2d 166

2) Objective bias can be shown in two ways. First, the appearance of partiality constitutes objective bias when a reasonable person could question the Ct's impartiality based on the Ct's statements. Second, actual objective bias occurs when there are objective facts demonstrating that the Trial Ct treated a party unfairly. Both forms might appear at the same time

B. Motion to Disqualify Judge for Cause

§ 757.19(2)
Comment

1) Sec. 757.19(2) does not appear to abolish right of party to challenge Judge for bias or prejudice

See 46 Am Jur 2d
Judges § 126 (2017)

2) Statutory, mandatory grounds of disqualification of Judge have been held not to be exclusive so as to eliminate common-law grounds for disqualification

Wis Jud Comm'n v
Gorski (In re Jud
Disciplinary Proceedings
Against Gorski)
2020 WI 5
390 Wis. 2d 22

3) A close friendship with an Atty appearing in front of the Ct creates objective bias

Miller v Carroll
(In re Paternity of BJM)
2020 WI 56
392 Wis. 2d 49

4) A Judge's use of social media with a party can form the basis of finding objective impartiality and grounds for disqualification. Judges' online interactions, like real-world interactions, must be treated with a degree of care

St v Walberg
109 Wis. 2d 96, 105
(1982)
St v Asfoor
75 Wis. 2d 411, 436
(1977)
St v Bell
62 Wis. 2d 534, 537
(1974)
St v Rochelt
165 Wis. 2d 373, 378, 379
(Ct. App. 1991)

5) Def did not have statutory right of substitution because it is pretrial right, but no person should be tried by Judge prejudiced against that person

St v Rochelt
165 Wis. 2d 373, 378–80
(Ct. App. 1991)

6) A litigant is denied due process only if the Judge, in fact, treats him or her unfairly. A litigant is not deprived of fundamental fairness, either by the appearance of a Judge's partiality or by circumstances that might lead one to speculate as to his or her partiality. In such a case, a refusal to recuse is harmless error

4. Disqualification of Court Commissioner

§ 757.23

A. Mandatory disqualification

1) Circuit or Supplemental Ct Comm'rs and Judges, when acting as Ct Comm'rs, are disqualified when

a. A party in the action

b. Own rights or interests would be affected

Wis Jud Comm'n v Gorski (In re Jud Disciplinary Proceedings Against Gorski)
2020 WI 5
390 Wis. 2d 22

c. Connected through legal profession in any manner with any party, agent, or Atty

B. Sanction

Violators shall forfeit $25 for each violation and be subject to removal from office

CV 4: SCHEDULING/PRETRIAL CONFERENCE

SCHEDULING CONFERENCE

§ 802.10(3)

1. Scheduling Conference Discretionary, Not Mandatory

A. Ct may enter scheduling order

1) On own motion, or

2) On motion of a party

3) After consultation with Attys and unrepresented parties

§ 802.10(1)

B. Certain matters exempted

1) Appeals to Circuit Ct

2) Actions seeking remedy available by certiorari, habeas corpus, mandamus, prohibition, quo warranto

3) Actions in which all Defs are in default

4) Provisional remedies

5) Actions under §§ 49.90 and 66.0114

6) Actions under Chs 48, 54, 102, 108, 227, 348, 767, 778, 799, 812, and proceedings under Chs 851–882

§ 802.10(3)
Recommendation

C. Participants at scheduling conference

1) Judge

May be scheduling clerk

2) One Atty of record for each represented party

a. Does not require presence of trial Atty

SCR 10.03

b. With permission of Ct, nonresident Atty may appear and participate in association with an active member of the Bar on a particular case

3) Any unrepresented parties

4) Conference may be conducted by telephone

Committee Comment

5) Conference rarely held on record unless highly complex matters

§ 802.10(3)

2. Matters to Be Covered at Scheduling Conference

A. Time deadlines, dates

§ 802.10(3)

1) Time to join parties

2) Time to amend pleadings

3) Time to file motions

§ 802.10(5)

4) Date for pretrial conference

5) Date for trial

§ 805.01(2)

B. Mode of trial

§ 802.10(3)(e)
Wickert v Burggraf

214 Wis. 2d 426
(Ct. App. 1997)

1) Not more than 30 days after entry of scheduling order, mode of trial determined

a. Including demand for jury trial and payment of fees under § 814.61(4)

Phelps v
Physicians Ins Co of Wis
2005 WI 85, ¶¶ 26–36
282 Wis. 2d 69
Chitwood v AO Smith
Harvestore Prods
170 Wis. 2d 622
(Ct. App. 1992)

b. Failure to pay jury fees on time waives right to jury trial unless party moves to extend time and Ct finds excusable neglect

§ 805.01(2)

c. Party must timely demand Ct trial or waived

Parsons v Associated
Banc-Corp
2017 WI 37, ¶¶ 31–37
374 Wis. 2d 513

2) Jury trial may be waived by unambiguous contract

Rao v WMA Sec, Inc
2008 WI 73, ¶ 22
310 Wis. 2d 623

a. Need not be intentional relinquishment of a known right

§ 802.10(3)

C. Discovery

§ 802.10(3)(d)

1) Time to complete discovery

§ 802.10(3)(f)

2) Limitation, control, and scheduling of depositions and discovery

a. Identification and disclosure of expert witnesses and, if appropriate, lay witnesses

b. Limitation of number of expert witnesses

§ 802.10(3)(jm)

c. Need for discovery of electronically stored information

§ 802.10(3)(h)

D. Appropriateness and timing of summary-judgment adjudication

§ 802.10(3)(j)

E. Need to adopt special procedures to manage complicated or protracted cases

1) Use of referee

St ex rel Universal Processing Servs of Wis, LLC v Circuit Ct of Milw Cty
2017 WI 26
374 Wis. 2d 26

Ct has power to appoint a referee in an exceptional case: appointment should be rare

a. Adjunct to the Judge

b. Must be supervised by Ct and functions restricted

c. Cost must not be so unreasonable as to limit meritorious claims

d. May handle discovery disputes but not dispositive motions

e. Ct must review de novo any objections to referee's rulings

§ 802.10(3)(i)

3. Consideration of Alternative Dispute Resolution (ADR)

Recommendation

A. Ct may set a date for report from counsel concerning exploration by parties of feasibility of ADR

§ 802.12(1)

B. Statutory settlement alternatives

1) Binding arbitration—needs consent of all parties, and decision legally binding

St ex rel CityDeck Landing LLC v Circuit Ct for Brown Cty
2019 WI 15, ¶ 36
385 Wis. 2d 516

a. Ct has no authority to stay arbitration to determine an insurance coverage issue

Midwest Neurosciences Assocs, LLC v Great Lakes Neurosurgical Assocs, LLC
2018 WI 112, ¶ 89
384 Wis. 2d 669
US Bank Nat'l Ass'n v Klein
2024 WI App 7
410 Wis. 2d 598

b. However, arbitrability or whether arbitration has been waived by a party's litigation conduct is to be decided by the Circuit Ct

2) Direct negotiation—exchange of offers and counteroffers

3) Early neutral evaluation—neutral third party evaluates dispute from oral or written presentations early in the dispute

4) Focus group—panel of citizens selected in an agreed-upon manner hear abbreviated presentations and render advisory opinion

5) Mediation—dispute resolution process with neutral third party whose decision not binding but focuses on key issues in effort to help parties reach agreement

6) Mini-trial—process by which presentations made to panel selected by parties in attempt to negotiate settlement

7) Moderated settlement conference—settlement conference conducted by one or more neutral third persons who aid in settlement negotiations and may render advisory opinions

8) Nonbinding arbitration—neutral third person may render nonbinding decision as basis for negotiations—evidence may be presented

9) Summary jury trial—must adhere to following conditions

   a. Abbreviated presentations by Attys to small jury selected from regular jury list

   b. Judge presides and makes evidentiary decisions

   c. Parties may discuss jury's advisory verdict with jury

   d. Jury's assessment may be used in subsequent negotiations

§ 802.12(2)(a)

C. Judge may, with or without a motion of parties, select a settlement alternative in cases deemed appropriate

Recommendation

1) Inform parties that, if one party requests ADR, Ct will order matter to ADR

2) If parties cannot agree on form of settlement alternative, Judge shall specify least costly settlement alternative that Judge believes likely to bring parties together in settlement

§ 802.12(2)(b)

   a. Unless all parties consent, Ct may not order use of binding arbitration, nonbinding arbitration or summary jury trial, or use of more than one of following: binding arbitration, early neutral evaluation, focus group, mediation, mini-trial, moderated settlement conference, nonbinding arbitration, summary jury trial

§ 802.12(2)(c)

b. If parties cannot agree on person to provide settlement alternative, Judge may appoint such person

§ 802.12(2)(d)

c. If parties cannot agree regarding payment of provider of settlement alternative, Judge shall direct parties to pay reasonable fees and expenses of provider, and may order parties to pay into an escrow account an amount estimated to be sufficient

Gray v Eggert
2001 WI App 246
248 Wis. 2d 99

3) Sanctions may not be imposed if parties mediate and fail to settle

§ 802.10(3)

4. Scheduling Order

A. Judge shall issue written order that recites schedules established

Judge may ask participating Atty to draft order for Ct's signature

B. Scheduling order, unless later modified, controls course of action

Kustelski v Taylor
2003 WI App 194, ¶ 15
266 Wis. 2d 940

Ct has discretion to determine whether and to what extent it will enforce its own scheduling orders

C. Order may be amended upon timely motion by party

1) Amendment may be made if it appears schedules cannot reasonably be met

2) If Judge cannot reasonably meet pretrial date or trial date established may amend order on own motion

Parker v Wis Patients Comp Fund
2009 WI App 42, ¶¶ 9–21
317 Wis. 2d 460

3) Untimely motions to enlarge scheduling order deadlines governed by § 802.10, not "excusable neglect" standard of § 801.15(2)(a)

Teff v Unity Health Plans Ins Corp
2003 WI App 115, ¶ 29
265 Wis. 2d 703

4) Circuit Ct has broad discretion to respond to untimely motions to amend scheduling orders because that broad discretion is essential to Ct's ability to manage its calendar

Hefty v Strickhouser
2008 WI 96
312 Wis. 2d 530

D. Scheduling order can trump time limits in § 802.08(2) and set different time limits, but scheduling order cannot merely incorporate local rule that is void because it differs from statutory time limits

§ 802.10(7)

5. Sanctions

A. Violation of scheduling order is subject to provisions of §§ 802.05, 804.12, 805.03, and 895.044. *See* CV 24 (Frivolous Actions)

§ 805.03
Buchholz v Schmidt
2024 WI App 47, ¶ 61
413 Wis. 2d 308
Buchanan v Gen Cas Co
191 Wis. 2d 1
(Ct. App. 1995)

B. Action authorized by § 804.12(2)(a) may be taken for failure to obey Ct order

1) Establish matters of fact in accordance with claim of aggrieved party

2) Prohibit disobedient party from introducing designated matters in evidence

3) Strike pleadings or parts of pleadings

4) Stay further proceedings until order complied with or obeyed

5) Dismiss action or render default judgment

6) Treat as contempt of court

7) Order payment of costs, including Atty fees

§ 805.03

C. If Ct dismisses action, dismissal operates as adjudication on merits

1) Ct may, for good cause, specify otherwise

2) Dismissal may be set aside on grounds in and in accordance with § 806.07

Trispel v Haefer
89 Wis. 2d 725 (1979)

D. Dismissal of action for failure to comply with pretrial order should rarely be granted, except

1) If conduct egregious

2) If bad faith demonstrated

Trispel v Haefer
89 Wis. 2d 725 (1979)
Cf City of Brookfield
v Milw Metro
Sewerage Dist
171 Wis. 2d 400, 423
(1992)

E. Standard for review of dismissal on appeal is erroneous exercise of discretion

Loy v Bunderson
107 Wis. 2d 400, 414–15
(1982)

> An exercise of discretion will be sustained if the Circuit Ct examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach

F. Sample Scheduling Conference Orders

SCHEDULING CONFERENCE ORDER

STATE OF WISCONSIN : CIRCUIT COURT KENOSHA COUNTY

JUDGE:_____ Case No. _____ -CV- _____

TITLE OF ACTION: ATTORNEYS:

_____ _____

_____ _____

Plaintiff(s)

vs.

_____ _____

_____ _____

Defendant(s) and/or Third-Party Plaintiffs

vs.

_____ _____

_____ _____

Third-Party Defendant(s)

GENERAL INFORMATION

Kind of action and any special legal or evidentiary problems in the case:_____

_____

Nature of the trial desired: _____ Court or _____ Jury. [ ] 6 person [ ] 12 person

JURY FEE TO BE PAID WITHIN 30 DAYS.

Length of the trial: _____ (days) (weeks).

Date of Pretrial Conference: _____, _____at_____.

Date of Trial: _____, _____at_____.

TIME LIMITS

If any party is making a claim of permanent injury, that party shall provide to the party defending against such claim, a medical report substantiating any such claim no later than _____, _____.
This report shall include an opinion as to permanency and all significant findings.

The party defending against such claim, if desired, shall have until _____, _____, to schedule and complete an independent medical examination of the party claiming a permanent injury. The person who causes the medical examination to be performed, shall promptly obtain and forthwith submit to the other parties in this lawsuit a report on the results of such examination; which report shall include an opinion as to permanence.

Any party claiming damages for personal injuries shall provide to the party defending against such claim, no later than sixty (60) days from the date of this order, a medical authorization, giving to that party consent to inspect any x-ray photograph taken in the course of the diagnosis or treatment of the party for the injuries for which damages are claimed; and for the right to inspect and copy any hospital, medical or other records or reports concerning the injuries claimed and treatment of those injuries. The parties are further directed to, and ordered to comply with, Wis. Stat. § 804.10(3).

DESIGNATION OF WITNESSES:

The plaintiff shall separately designate all lay and expert witnesses no later than _____, _____.
The defendant shall separately designate all lay and expert witnesses no later than _____, _____.
Any expert so designated shall, at the time the expert is named, be able to form an opinion which the expert intends to testify to at trial.

AMENDMENT OF PLEADINGS: Neither party shall amend their pleadings including counterclaims without leave of the Court, except as follows: (If none so state.) _____
_____.

IMPLEADING OF PARTIES: The (plaintiff) (defendant) _____ (other), shall have sixty (60) days from the date of this order to join as a party to this action under Wis. Stat. § 803.03, any person or party who may have an interest in the outcome of this action by reason of a subrogated, derivative or assigned right.

PRETRIAL MOTIONS: All pretrial motions, except motions in limine or upon leave of the court, shall be filed by:

_____, _____.

DISCOVERY: Unless the court orders otherwise or upon motion for good cause, all requests for discovery shall be served by a date sufficiently early so that the response should be due or completed twenty (20) days before the date set for trial. This requirement also applies to depositions that are intended to be introduced into evidence at trial pursuant to Wis. Stat. § 804.07.

VIDEOTAPE DEPOSITIONS: Any party who intends to present evidence to the jury at the trial by means of a videotape shall notify all other parties in this action of that decision no later than twenty (20) days before the trial date. This notice shall include the name of the person whose videotape deposition is involved. Any party who will be objecting to any portion of this deposition shall file no later than fifteen (15) days before the trial date, a written request with the court to schedule an editing conference.

INSURANCE: Any insurer from whom damages are sought and who has pleaded policy limits as a defense shall furnish all parties with a certified copy of the policy face sheet disclosing the limits of liability within forty-five (45) days after this date and having done so, shall be relieved of the necessity of proving the limits at the trial.

JURY INSTRUCTIONS: Each party shall file with the court at the time of the final pretrial, a complete list of their requested jury instructions. Each party shall also attach to the list a complete set of those jury instructions (without accompanying jury commissioner comments) being requested. The parties shall also prepare, as practically as possible, a proposed verdict. The verdict so proposed shall be "clean" in that it should not contain any introductory language or indicate who the proponent is, but should be of such a nature that it could be sent to the jury as is.

SUMMARY/DEFAULT JUDGMENT: An application for summary/default judgment shall be made in the case and shall be heard by the court on:

_____, _____.

POLICIES OF THE COURT

AUTHORITY: Attorneys appearing at the pretrial shall, pursuant to Wis. Stat. § 802.10, be the attorney who will be taking part in the trial and shall have authority to enter into stipulations or to settle the case or shall have immediate telephonic access to those who have such authority.

LOCAL COURT RULES: The parties are hereby instructed to obtain a copy of the local court rules which have been promulgated in Kenosha County. These may be obtained directly from the Clerk of Court, Room 210, Kenosha County Courthouse. Failure to abide by these rules may result in sanctions being imposed according to law and as set forth in this order.

SANCTIONS: All parties are hereby advised that there shall be strict adherence to this order. Parties and counsel who neglect, ignore, or disobey the terms and requirements of this scheduling order are subject to the sanctions authorized by law pursuant to Wis. Stat. §§ 802.05, 804.12, 805.03, and 895.044, which include but are not limited to the limitation on presentation of evidence, monetary penalties, contempt citations, the striking of pleadings, entry of judgment by default, and dismissal of the action.

OTHER MATTERS: _____

_____

_____

SCHEDULING CONFERENCE WORKSHEET

STATE OF WISCONSIN CIRCUIT COURT _____COUNTY
Branch 4

Attorney:

_____ _____

_____ _____

Plaintiff(s),

vs.

_____ _____

_____ _____

_____ _____

_____ _____

Defendant(s).

Essential Facts:

DIVORCE ONLY: Have financial disclosure statements been filed? _____

1. Jury fee paid: _____
2. Trial date (court or jury): _____
3. Pleadings to be amended by: _____
4. Plaintiff's experts named by: _____
5. Defendant's experts named by: _____
6. Defense Medical Examinations (DMEs), Defense Vocational Examinations (DVEs), and reports: _____
7. Discovery shall be completed by: _____
8. Jury instructions, special verdict form, briefs, etc., due by: _____
9. Time management and pretrial conference: _____
10. If court trial:
    a. Detailed brief: _____
    b. Stipulation on agreed facts: _____
    c. List of all witnesses and brief summary of testimony: _____
    d. Description and number of exhibits: _____
11. Miscellaneous deadlines:

STATE OF WISCONSIN	CIRCUIT COURT Branch 4	EAU CLAIRE COUNTY

(name of plaintiff),

Plaintiff,

vs.

(name of defendant),

Defendant.

SCHEDULING ORDER

Case No. (case number)

A scheduling conference was held on (date of conference), 20__. The plaintiff appeared by (attorney for plaintiff). The defendant appeared by (attorney for defendant).

IT IS ORDERED:

1. The plaintiff shall name experts by (date), 20__.
2. The defendant shall name experts by (date), 20__.
3. Defense medical examinations and defense vocational evaluations of the plaintiff shall be completed and reports provided to the plaintiff's attorney by (date of independent medical examination), 20__.
4. Dispositive motions with supporting affidavits shall be filed by _____.

5. All motions in limine shall be filed by _____. Failure to file constitutes waiver of such motions, including any objections to expert testimony under Wis. Stat. § 907.02(1), unless good cause shown.

6. Discovery shall be completed by (date), 20__.

7. A time management and pretrial conference is scheduled (date of final pretrial), 20__, at (time of final pretrial). Counsel is required to appear in person. The following matters will be determined:

a. The number of witnesses for each side, the time and date they are scheduled to appear, and the estimated length of their testimony.

b. Stipulations on admitted facts.

c. The number and manner of presentation of all exhibits.

d. The parties should be prepared to argue any pretrial motions that have been filed as well as any objections to videotape testimony.

8. Proposed jury instructions, special verdict forms, voir dire questions, pretrial motions, and legal briefs, if any, shall be filed and exchanged no later than (date of proposed JI, etc.), 20__. See attached order.

9. A brief, written "statement of the case" to be read to the jury before voir dire is to be filed and exchanged no later than (date of final pretrial), 20__.

10. A 12-person jury trial is scheduled to commence (date of trial), 20__, at (time of trial), and is expected to last (length of trial) days.

11. On or before _____, the parties shall complete mediation. The parties and their attorneys shall participate in person. Any corporate party or organization shall appear, in addition to counsel of record, by an individual with full authority to negotiate, unless the mediator permits otherwise.

12. The deadlines set forth in this order may not be extended without consent of the Court.

SCHEDULING ORDER

CASE NO.

TITLE OF ACTION:

PLAINTIFF'S ATTORNEY:

DEFENDANT'S ATTORNEY:

SCHEDULING CONFERENCE AGREEMENTS:

Trial (Court) (Jury) (6)(12) shall commence during week of: (Length of trial)
(Counsel/parties must be present at 8:30 a.m. on the day of trial)

Filing of Jury Fee and Written Demand Due:

Final Pretrial:
(Attorney handling trial must be present at final pretrial)
(Attorney must be in contact with someone with authority to settle at the time of the final pretrial. FAILURE TO HAVE SOMEONE AVAILABLE WILL RESULT IN SANCTIONS.)

Alternative Dispute Resolution (The Court may order both parties to ADR if one party requests it)
[ ] Counsel to advise in writing by:
[ ] Parties are ordered to ADR by:

Jury Instructions/Proposed Verdict Due at Final Pretrial

Motions in Limine to Be Filed: Five (5) days before final pretrial/argue at final pretrial

Discovery Cut-Off: Same date as final pretrial unless stipulated by parties

Plaintiff Names Experts By:

Defendant Names Experts By:

Plaintiff Names Rebuttal Experts By:

Independent Medical Exam Completed By:

Amend Pleadings By:

Other (Including Motions)

Scheduling Conference Held On:

Copies to:

PRETRIAL CONFERENCE

But cf CV 8, Sec. 5.D.

1. Pretrial Conference Not Mandatory

§ 802.10(3)

A.

Judge sets date and time of pretrial conference

1) Date set in scheduling order issued after scheduling conference

2) Date set by Ct order

B. May be conducted by telephone under § 807.13(3)

1) Upon Ct's own motion

2) Unless good cause to contrary shown

§ 802.10(5)

2. Purposes of Pretrial Conference

§ 802.10(5)
Schneck v
Mut Serv Cas Ins Co
18 Wis. 2d 566, 572
(1963)

A. Define and simplify issues

§ 802.10(5)

B. Eliminate frivolous claims or defenses

C. Explore possibility of obtaining admissions or stipulations

D. Make evidentiary rulings, including limitations on use of experts under § 907.02

E. Identify witnesses, exhibits, and tangible demonstrative evidence

F. Determine need and schedule for filing and expanding pretrial briefs

G. Dispose of pending motions

Recommendation

H. File proposed jury instructions and verdict or set date for filing

I. Determine such other matters as may aid in the disposition of action

Recommendation

1) Disclosure of insurance policy limits

Agreement by Attys as to amount of insurance policy limits eliminates need to prove it at trial

§ 802.12

2) Consider ADR

For full discussion, see Scheduling Conference, *supra*

3. Participants

§ 802.10(6)

A. At least one Atty on behalf of each party

1) Attys must have authority to enter stipulations and make admissions

2) Attys must be prepared to participate in conference

§ 802.10(6)

B. Parties should be available to confer with their Attys

1) Ct may require party or representative to be present or available by telephone

2) Permits Attys to participate in conference with immediate authority available

Reduces need to amend pretrial order at late date

Recommendation

3) Do not allow parties to be present in chambers during conference

To do otherwise would inhibit free discussion necessary for meaningful conference

C. Judge

Recommendation

1) Judge must review file before conference

a. To fully understand and be able to clearly define the issues

b. To intelligently lead discussion of statutory matters to be covered

4. Sanctions for Failure to Appear

§ 802.10(7)

A. Sanctions may be imposed when

1) Without just excuse, no appearance is made on behalf of party, or

2) Without just excuse, Atty is grossly unprepared to participate in conference

§ 802.05, § 804.12,
§ 805.03, § 895.044

B. Available sanctions. *See* CV 24 (Frivolous Actions)

Recommendation

1) Reschedule conference

Order delinquent Atty or party to pay reasonable expenses of aggrieved party, including reasonable Atty fees

Recommendation

2) Conduct conference

Enter pretrial order without participation by delinquent Atty

3) Order dismissal or entry of default judgment

Latham v
Casey & King Corp
23 Wis. 2d 311, 314
(1964)

a. Ct has inherent power to dismiss action in interest of orderly administration of justice

Schneider v Ruch
146 Wis. 2d 701, 708
(Ct. App. 1988)

b. Ct must make finding that a party or counsel acted egregiously or in bad faith before dismissal or default judgment

5. Pretrial Order

Fredrickson v
Louisville Ladder Co
52 Wis. 2d 776, 780
(1971)

A. Record must be made of any agreements reached at pretrial conference

Schneck v Mut Serv
Cas Ins Co
18 Wis. 2d 566,
572–73 (1963)

B. Pretrial order controls subsequent course of trial

6. Enforcement of Pretrial Order

Industrial Roofing Serv,
Inc v Marquardt
2007 WI 19
299 Wis. 2d 81
Furrenes v
Ford Motor Co
79 Wis. 2d 260,
265 (1977)

A. Ct may dismiss action on its merits for failure to comply with pretrial order except when client is blameless

Featherly v
Continental Ins Co
73 Wis. 2d 273, 282
(1976)

B. Ct may exclude evidence because of lack of compliance with pretrial order

State v Ronald LM (In re
Paternity of Dustine RP)
185 Wis. 2d 452
(Ct. App. 1994)
Carlson Heating, Inc
v Onchuck,
104 Wis. 2d 175
(Ct. App. 1981)

1) Ct may bar a party from calling witnesses or presenting any testimony

Karl v Employers Ins
78 Wis. 2d 284, 301
(1977)

2) Failure of party to call expert witness listed in pretrial order is not violation of order

§§ 802.10(7), 805.03

C. If party fails to obey any Ct order, Ct may consider sanctions authorized by § 804.12(2)

§ 804.12(2)(a)1.

1) Take matters or facts to be established in accordance with claim of aggrieved party

§ 804.12(2)(a)2.

2) Prohibit disobedient party from introducing designated matters in evidence

§ 804.12(2)(a)3.

3) Strike pleadings or parts of pleadings

§ 804.12(2)(a)3.

4) Stay further proceedings until order is complied with or obeyed

§ 804.12(2)(a)3.

5) Dismiss action or render default judgment

§ 804.12(2)(a)4.

6) Enter contempt order for disobedience

a. Available in addition to or in lieu of any other action listed above

b. Not available for failure to submit to physical or mental examination

§ 804.12(2)(b)

7) Order payment of costs, including Atty fees

Available in addition to or in lieu of any other action listed above

§ 804.12(5)

D. Motions may be heard by telephone as prescribed in § 807.13

7. Sample Form

A. Pretrial Conference Data Sheet

TO ALL ATTORNEYS:

A pretrial conference shall be held in all civil jury actions. Pretrial conferences shall be attended by the attorneys who shall be in charge of the trial of the case. The rule further provides for the furnishing of the following information to the Court of the pretrial conference; therefore, please complete this form and hand it to the judge at the pretrial conference.

PRETRIAL CONFERENCE DATA

CIRCUIT COURT DANE COUNTY

Submitted by: _____

Date of Pretrial _____, _____ Case No. _____

TITLE OF ACTION: ATTORNEYS:

_____ Plaintiff _____

— VS —

_____ Defendant _____

_____ Interpleaded Defendant _____

(1) Kind of Action: _____
(Tort, Personal Injury, Pedestrian–Auto Collision, etc., Contract–Sale of Goods, etc.)

(2) Issues Involved: _____

_____

_____

_____

_____

(3) Please give a brief summary of the factual situation in regard to the cause of action or defense, including time; dates; ages of parties; claimed negligence, if tort action; violation, if contract action; etc. _____

_____

_____

_____

(Continued on reverse side)

(3) Continued _____

_____

_____

_____

_____

_____

_____

_____

(4) Itemize below claimed special damages, if any: _____

_____

_____

_____

_____

_____

_____

_____

(5) My client(s) is(are) willing to submit this case to mediation: _____

☐ Yes ☐ No If "No", why not? _____

_____

ADDITIONAL REMARKS: _____

_____

_____

_____

_____

_____

_____

_____

_____

Submitted By: _____

CV 5: PRETRIAL MOTIONS

1. Technical Requirements for Motions

§ 802.01(2)

A. Must be in writing, unless made during a hearing or trial

1) Must state grounds with particularity

2) Must set forth relief or order sought

§ 802.01(2)(d)

3) Must be captioned and signed and must comply with formal requirements of pleadings

B. No orders to show cause permitted unless specifically authorized by statute

§ 801.15(4)

C. Motions must be brought on 5 days' notice, unless ex parte motion for order shortening time is granted

§ 801.15(5)

1) If notice served by mail, 3 days are added

§ 801.15(1)(b)

2) Day of motion hearing, as last day of time period, is included, unless it is day that Clerk of Ct's office is closed

§ 801.15(1)

3) Saturdays, Sundays, and holidays are excluded in calculating the relevant time period

§ 801.15(4)
§ 802.08(2)

4) Opposing affidavits may be served by resisting party not later than 1 day before motion hearing, except if summary-judgment affidavit

§ 801.15(5)(b)

5) If service by fax, by email, or by e-filing system under § 801.18, between 5 p.m. and midnight, add 1 day to prescribed period

§ 802.01(2)(e)

6) Motion that requires notice under § 801.15(4) deemed made only when served with its notice of motion

7) Summary-judgment requirements differ. See **CV 6, Sec. 3**

§ 802.01(2)(b)
§ 801.15(4)

D. All records, papers, and affidavits supporting motion shall be served with notice of motion and motion

Commercial Disc Corp v Milw W Bank
61 Wis. 2d 671 (1974)

Ct may disregard depositions relied upon unless moving party specifies portions relied upon

2. Amendment of Pleadings

§ 802.09(1)

A. Once as a matter of course within 6 months after filing summons and complaint or per scheduling order; thereafter, need permission of Ct or consent of adverse parties

Schuett v Hanson
2007 WI App 226, ¶ 8
305 Wis. 2d 729

Amendment effective upon service on Def, not filing with Ct

§ 802.09(3)
Gross v Woodman's Food Mkt, Inc
2002 WI App 295
259 Wis. 2d 181

B. An amended pleading may relate back to date of filing of original complaint, provided specific statutory requirements are met and no unfairness or prejudice results

Tews v NHI, LLC
2010 WI 137, ¶ 72
330 Wis. 2d 389

1) Amended pleading adding party allowed (even if applicable statute of limitation has expired) if:

a. New claim arose out of transaction/occurrence in original complaint; and

b. Added party received notice of action within time prescribed by law (such that the party will not be prejudiced in maintaining a defense on the merits); and

c. Within period provided by law for bringing action, added party knew or should have known that, but for mistake, claim would have been brought against added party

Bartels v Rural Mut Ins Co
2004 WI App 166
275 Wis. 2d 730

2) However, statute-of-limitation protection will be afforded to a party that was not appropriately and timely served with the original summons and complaint

Mach v Allison
2003 WI App 11,
¶ 27, 259 Wis. 2d 686

C. When motion to amend is filed after summary judgment has been granted, no presumption exists to allow amendment

1) Absence of prejudice alone not sufficient

2) Moving party must present sufficient reason to overcome finality of judgment

3) Ct should consider following factors

a. Reason why party did not act sooner

b. Time since filing original complaint

c. Number and nature of prior amendments

d. Nature of proposed amendment

e. Effect on non-moving party

Aon Risk Servs, Inc v Liebenstein
2006 WI App 4,
¶¶ 38–39
289 Wis. 2d 127

D. When motion to amend is filed after summary judgment is denied, leave to amend should be freely given

Suchomel v UW Hosp & Clinics
2005 WI App 234,
¶ 14, 288 Wis. 2d 188

E. It is within Ct's discretion to allow amendments of pleadings until and even after judgment

Tietsworth v Harley-Davidson, Inc
2007 WI 97
303 Wis. 2d 94

F. Circuit Ct has no authority on remand to allow amended complaint after appellate Ct dismissal on the merits

SCR 10.03(4)
RMC Form CA-180

3. Pro Hac Vice

A. Judge may allow nonresident counsel to appear in Ct and participate in a particular action or proceeding

1) Must be with active member of State Bar of Wisconsin who appears and participates in action or proceeding

Seitzinger v Cmty Health Network
2004 WI 28
270 Wis. 2d 1

No due-process right to be represented by Atty unlicensed in Wisconsin

2) Permission to nonresident lawyer may be withdrawn by Judge granting it if

a. Lawyer by his or her conduct manifests incompetency to represent client in Wis Ct

b. Lawyer is unwilling to abide by rules of professional conduct for Attys and rules of decorum of Ct

Filppula-McArthur v Halloin
2001 WI 8
241 Wis. 2d 110

- Improper conduct in other Wis Cts may be considered in motion

Committee Recommendation

- Consider interests of Atty's client in making revocation determination

Jensen v Wis Patients Comp Fund
2001 WI 9
241 Wis. 2d 142

c. Before pro hac vice admission is revoked, Atty must have notice and some opportunity to respond

SCR ch 10 app A
RMC Form CA-180

B. Must comply with SCR 10.03(4), including filing prescribed form and paying fee

§ 801.63

4. Motion to Stay Wisconsin Proceeding to Permit Trial in Foreign Forum

A. Statutory expression of common-law doctrine of *forum non conveniens*

1) Authorizes Ct to stay Wis proceeding if substantial justice would be served by matter being tried in a forum outside State

2) Motion must be filed before or with answer or reply to counterclaim

UIP Corp v Lawyers Title Ins Co
82 Wis. 2d 616 (1978)

3) Issues raised shall be tried to Ct in advance of any issue on merits and shall be joined with issues raised by motion to dismiss under § 802.06(2) (action pending between same parties for same cause)

Alexander v Sloan
73 Wis. 2d 145 (1976)

4) Moving party has burden of persuasion that trial in Wis will be inconvenient and unjust, and that trial in another forum is more convenient and more just

§ 801.63(4)

5) If stay granted, Ct retains jurisdiction for 5 years

§ 802.06(5)

5. Motion for More Definite Statement

§ 802.06(1)(b)
First applies to actions filed on July 1, 2018

A. Upon the filing of this motion, all discovery and other proceedings shall be stayed for 180 days or until the Ct rules on the motion, unless the Ct finds good cause on the motion of any party that particularized discovery is

necessary

B. Not a discovery device like old "bill of particulars"

C. Properly granted when party required to make a responsive pleading cannot reasonably do so because other party's pleading is so vague and ambiguous

D. Motion must be made before filing responsive pleading

1) Must specify defects complained of, and

2) Must request details desired to be able to form responsive pleading

§ 802.06(5)

E. If order granting more definite statement not obeyed within 10 days after notice of order or time set by Ct, Ct may strike pleading to which motion directed

§ 802.06(6)

6. Motion to Strike

A. Two purposes

1) Strike redundant, immaterial, impertinent, scandalous, or indecent matters from pleadings and may be done on Ct's own motion

2) Test legal sufficiency of a defense

First Nat'l Bank v Dickinson
103 Wis. 2d 428 (1981)

3) Motion to strike defense not to be granted unless facts alleged could form no bases for any theory of defense

Martin v Griffin
117 Wis. 2d 438
(Ct. App. 1984)

B. When answer is served or filed late, Ct must first grant motion to strike answer as untimely, before granting default judgment

§ 801.14(4)
Split Rock Hardwoods, Inc v Lumber Liquidators, Inc
2002 WI 66
253 Wis. 2d 238

1) Objective standard whether answer filed with Ct within reasonable time after service. Consider:

a. Length of time between service and filing

b. Factual or legal basis that explains delay

c. Whether time period too insignificant to warrant sanction

NOTE: Do not consider prejudice in assessing reasonableness of delay in filing.

2) Plaintiff must show prejudice to itself or Ct as part of analysis separate from reasonableness determination

As practical matter, before determining reasonableness, consider if prejudice exists. If no prejudice, then no need to determine reasonableness of delay, except as basis for lesser sanction

7. Consolidation and Severance

A. To consolidate or sever is within Ct's discretion

Leverence v
US Fid & Guar
158 Wis. 2d 64
(Ct. App. 1990),
overruled in part
on other grounds by
Wenke v Gehl Co
2004 WI 103
274 Wis. 2d 220

Consolidation or severance is determined at pretrial conference, if not sooner

B. Separate actions pending in one Ct

§ 805.05(1)(a)
August Schmidt Co v
Hardware Dlrs Mut
Fire Ins
26 Wis. 2d 517 (1965)
Fuchs v Kupper
22 Wis. 2d 107 (1963)
Freuen v Brenner
16 Wis. 2d 445 (1962)

Ct may order consolidation when actions that might have been brought as single action under § 803.04 for permissible joinder of parties are pending before Ct

C. Separate actions pending in different Cts

§ 805.05(1)(b)

1) When actions that might have been brought as single action under § 803.04 are pending in different Cts, any action may be transferred to other Ct where other action is pending on motion of party

§ 805.05(1)(b)

a. Conference involving both judges and all counsel may be held as prescribed by § 807.13(3)

b. Joint order of transferring and receiving Ct necessary

§ 801.52

2) Ct may change venue in interest of justice or convenience of parties

a. On own motion

b. On motion of party

c. On stipulation of parties

§ 805.05(2)
Waters v Pertzborn
2001 WI 62
243 Wis. 2d 703

D. Separate trials

1) Only differing *claims* may be bifurcated. *Issues* cannot be tried separately

§ 805.09(2)
Waters v Pertzborn
2001 WI 62
243 Wis. 2d 703

a. Liability and damages shall be tried before same jury

Query

- May separate issues be tried in phases before same jury? If yes, consider potential problems with 5/6 verdict requirement (See **CV 19**, this Benchbook)

Waters v Pertzborn
2001 WI 62, ¶ 30
243 Wis. 2d 703

- *Zawistowski v Kissinger*, 160 Wis. 2d 292 (Ct. App. 1991), overruled to extent that in conflict with above

§ 803.04(2)(b)
§ 805.05(2)

b. Ct may order separate trials on issues of liability and insurance coverage

Dahmen v
Am Fam Mut Ins Co
2001 WI App 198
247 Wis. 2d 541

c. UIM claim and bad-faith claim ordinarily should be bifurcated and discovery stayed regarding bad faith

§ 803.04(4)
§ 805.05(2)

2) Ct may order separate trials of claims to avoid delay or prejudice, to foster judicial economy, or to prevent a party from being embarrassed, delayed, or put to expense when the party asserts no claim or none is asserted against the party

§ 805.05(1)(a)

E. Order may consolidate for trial or consolidate actions for all purposes

1) If for trial only, judgment can be rendered in each action

2) If for all purposes, one judgment covers all

§ 803.03

8. Motion for Joinder

§ 803.03(1)

A. A person subject to joinder of process shall be joined if

Dairyland Greyhound Park, Inc v McCallum
2002 WI App 259
258 Wis. 2d 210

1) Person is necessary for just and complete relief

2) Person claims interest in subject of action and person's absence may impede that person's ability to protect that interest or leave persons in the action with inconsistent obligations because of his or her claim

§ 803.03(2)(a)

B. Related claims shall be joined with those with subrogation rights

§ 803.03(2)(b)

C. Party joined may participate, agree to have interest represented by party who caused joinder, or move for dismissal with or without prejudice

§ 803.03(3)

D. Whenever joinder not feasible, Ct to make determination based on four factors

1) To what extent would judgment rendered in person's absence be prejudicial to person or to parties already in the action?

Dairyland Greyhound Park, Inc v McCallum
2002 WI App 259
258 Wis. 2d 210

Use interest test applicable to intervention by right

2) If prejudice would result, could it be lessened?

3) Will judgment rendered in person's absence be adequate?

4) Will plaintiff have adequate remedy if action dismissed for nonjoinder?

§ 803.04

E. Permissive joinder

1) Permissive joinder as plaintiffs may occur when persons assert any right to relief jointly, severally, or in the alternative, arising out of same transaction or occurrence and if any question of law or fact common to all these persons will arise in the action

2) Permissive joinder as Defs may occur if there is asserted any right to relief against those persons under circumstances as in para. 1)

§ 803.04(2)

Insurers in negligence actions are proper parties to be joined, although separate trials may be necessary in regard to coverage and liability

§ 803.04(3)

3) In actions affecting interest of spouse in marital property, spouse who is not a real party in interest may join or be joined in the action

§ 803.04(4)

4) Separate trials may be granted by Ct when necessary to prevent embarrassment, delay, unnecessary expense, or prejudice

§ 803.09
Wolff v
Town of Jamestown
229 Wis. 2d 738
(Ct. App. 1999)

9. Motions to Intervene

§ 803.09(1), (2)

A. A party may intervene by right or by permission

§ 803.09(1)
Town of Mentor v St
2021 WI App 85, ¶ 14
400 Wis. 2d 138
Armada Broad, Inc
v Stirn
183 Wis. 2d 463, 471
(1994)

B. Intervention by right exists when four conditions met

1) Potential intervenor makes timely motion

2) Potential intervenor claims interest in property or transaction involved

3) Disposition of suit may, as a practical matter, impair or impede potential intervenor's ability to protect interest

§ 803.09(2)

4) Potential intervenor's interest not adequately represented by one or more parties to suit

§ 803.09(2)

C. Permissive intervention is at the Ct's discretion

Braun v Vote.org
2024 WI App 42, ¶ 37

413 Wis. 2d 88
pet for rev filed

1) Ct

a. Timeliness of motion

b. Whether movant's claims or defenses and the main action have a question of law and fact in common

c. Whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties

City of Madison v WERC
2000 WI 39, ¶ 11 n11
234 Wis. 2d 550

2) Permissive only requires movant be a proper party, not a necessary one

Rise, Inc v WEC
No 2022AP1838, ¶ 47
2023 WL 4399022
(Wis. Ct. App. 7/7/2023)
(unpublished opinion
citable for persuasive
value per § 809.23(3)(b))

3) The Ct need not permit a movant to intervene simply because the movant meets these factors

§ 803.09(2m)

D. Statutory challenges: intervention as of right by assembly, senate, or legislature

§ 13.365

If party challenges statute as unconstitutional, or as violating or preempted by federal law, or if party otherwise challenges construction or validity of statute, as part of claim or affirmative defense, then assembly, senate, or legislature may intervene

DNC v Bostelmann
2020 WI 80, ¶ 9
394 Wis. 2d 33

E. Intervening party becomes full participant in lawsuit and is treated as if it were original party

§ 803.10

10. Motion for Substitution of Deceased Party

§ 803.10(1)(a)
Schwister v Schoenecker
2002 WI 132
258 Wis. 2d 1

A. When substitution after death of party, Ct has wide discretion to decide which nonparties need to be served with suggestion of death to trigger 90-day period for substitution

11. Redacting Court Records

§ 801.19

A. Procedure

1) Parties must omit or redact protected information when filing documents

RMC Form GF-241

a. Protected information form required when filing contains protected information necessary to the action

b. Parties, not Ct, responsible to ensure protected information not filed

c. If party fails to protect own information, protection of rule is considered waived

d. Ct may seal on own motion and order a new filing of redacted documents

§ 801.20

B. Confidential Documents

1) Director of State Cts shall make publicly available list of commonly filed documents made confidential by statutes, Ct rules, and case law. *See* https://www.wicourts.gov/services/attorney/docs/conf_flyer.pdf

2) Documents on list treated as confidential without need for motion or Ct order

12. Sealing Court Records

§ 801.21

A. "Seal" means to order document, or portion of document, not accessible to public

B. Public policy favors public access to Ct records

C. Party seeking to protect Ct record not protected under § 801.19 or § 801.20 shall file motion to seal all or part of document

1) Must be served on all parties

2) Filing party shall specify authority for sealing documents

3) Ct receives under temporary seal, until ruling on motion

4) Ct determines whether hearing necessary

5) Ct may require notice of hearing to general public by posting at courthouse or other location

6) Ct determines whether sufficient grounds to restrict public access according to constitutional, statutory, and common law

Hathaway v
Joint Sch Dist No 1
116 Wis. 2d 388 (1984)
Bilder v Twp of Delavan
112 Wis. 2d 539, 554–58
(1983)

7) Presumption is to disclose unless:

a. Clear statutory exception

b. Common-law limitation

c. Constitutional rights implication

d. Overriding public interest in keeping records confidential

Krier v EOG Envtl, Inc,
2005 WI App 256, ¶ 21
288 Wis. 2d 623

D. Stipulation to closure insufficient unless presumption overcome

Bilder v Twp of Delavan
112 Wis. 2d 539, 554–58
(1983)

E. Hearing must be held

1) Party seeking nondisclosure must demonstrate with particularity that administration of justice requires sealing

2) Balance public interest in disclosure against public interest in nondisclosure

Bilder v Twp of Delavan
112 Wis. 2d 539, 554–58
(1983)
St v Doe
2005 WI App 68, ¶ 12
280 Wis. 2d 731

3) In camera inspection before sealing

4) Only seal if no less restrictive alternative

5) Ct must give reasons for its decision at a hearing or in a written decision

§ 801.21(4)

6) Public record shall indicate order to seal or redact was issued and name of Ct official entering order

§ 801.18(14)

7) Sealing orders apply to document in all formats (paper, e-filing, online, etc.)

13. Admissibility of Expert Testimony

(See Judge John DiMotto's checklists on CourtNet (the Wisconsin Ct System's intranet site), at https://courtnet.wicourts.gov/education/oje/dimotto.htm/)

See generally § 907.02(2)

(See also **Trial Evidence**, **CV 15, Sec. 1.G.**) for test and factors)

A. To admit or bar expert testimony is within Ct's discretion

Kumho Tire Co v Carmichael
119 S. Ct. 1167, 1176
(1999)
Seifert v Balink
2017 WI 2
372 Wis. 2d 525

1) Ct has broad latitude in determining reliability and fulfilling gatekeeping duties

Primiano v Cook
598 F3d 558, 563
(9th Cir 2010)
Gross v Woodman's Food Mkt, Inc
2002 WI App 295, ¶ 36
259 Wis. 2d 181

2) Admissibility of expert testimony is within Ct's discretion, even on summary judgment

See Bourjaily v US
107 S. Ct. 2775, 2778–79
(1987)

B. Party moving to exclude evidence has burden of presenting basis for the motion but burden is on proponent of the expert testimony to show by a preponderance that the testimony is admissible

§ 901.04
Daubert v Merrell Dow Pharm, Inc
113 S. Ct. 2786, 2796
(1993)

C. Ct decision on admissibility is made outside the presence of the jury, and Ct is not bound by rules of evidence except on privileges

Kumho Tire Co v Carmichael
119 S. Ct. 1167, 1176
(1999)

D. Evidentiary hearing is not required, and Ct may decide motion in its discretion on affidavits and briefing

See Heller v Shaw Indus, Inc, 167 F.3d 146, 159–60
(3d Cir 1999)

1) Ct is not deciding which expert is right or wrong, and inadmissibility of one expert's testimony does not necessarily exclude other expert testimony

Daubert v Merrell Dow Pharm, Inc
113 S. Ct. 2786, 2799 (1993)
Kumho Tire Co v Carmichael
119 S. Ct. 1167, 1176–79 (1999)

2) Focus is on the record and expert's opinions in this case, not experts generally in a discipline

14. Appointment of Counsel

Joni B v St
202 Wis. 2d 1 (1996)

A. Inherent Authority

1) Fundamental fairness requires that Circuit Ct Judges have discretion to appoint counsel

2) Cts may do so when it serves Ct's interests

3) Does appointment of Atty further Ct's need for orderly and fair case presentation?

4) Whether Ct appoints Atty or not, best to memorialize findings and rationale on the record

St v Tammy LD
(In Int of Xena X D-C)
2000 WI App 200, ¶ 32
238 Wis. 2d 516

B. Ct need not advise all civil litigants of Ct's authority to appoint Atty

Piper v Popp
167 Wis. 2d 633 (1992)

C. Party seeking Ct appointment of Atty must overcome presumption against appointment

1) Ct must balance the following elements:

   a. Private interests at stake;

   b. Government's interest;

   c. Risk of erroneous decisions, considering:

   - Whether there is an equal contest of opposed interests;
   - Complexity of the factual and legal issues;
   - Ability/inability of the indigent person to present the case in Ct

2) Ct assigns "net weight" to elements and balances them against presumption that due-process right to Atty only exists when personal freedom is jeopardized

3) If elements rebut presumption, then due process requires appointment of counsel

CV 6: DISPOSITIVE MOTIONS

§ 802.06(3)

1. Motion for Judgment on the Pleadings

§ 802.06(1)(b)

A. Upon the filing of this motion, all discovery and other proceedings shall be stayed for 180 days or until the Ct rules on the motion, unless the Ct finds good cause on the motion of any party that particularized discovery is necessary

B. May be made after issue joined and within time so as not to delay the trial

C. If matters outside pleadings are presented, motion treated as summary-judgment motion under § 802.08

Soderlund v Zibolski,
2016 WI App 6, ¶ 37
366 Wis. 2d 579

1) Incorporation by reference. A Ct may consider a document attached to a motion for judgment on the pleadings without converting to a summary judgment motion if the document was referred to in the complaint, the document is central to the claim, and its authenticity has not been disputed

All Elec Serv v Matousek
46 Wis. 2d 194 (1970)
Kellner v Christian
188 Wis. 2d 525
(Ct. App. 1994)
aff'd 197 Wis. 2d 183
(1995)

D. Addresses only legal issues

1) Motion functionally like summary-judgment motion, but based only on pleadings

2) Motion will be denied if there are factual issues

§ 802.06(4)

3) Must be heard before trial, unless Judge orders hearing deferred until trial

§ 802.06(2)

2. Motion to Dismiss

§ 802.06(1)(b)

A. Upon the filing of this motion, all discovery and other proceedings shall be stayed for 180 days or until the Ct rules on the motion, unless the Ct finds good cause on the motion of any party that particularized discovery is necessary

B. Voluntary dismissal without Ct order

§ 805.04(1)
Gowan v McClure
185 Wis. 2d 903
(Ct. App. 1994)

1) Plaintiff may dismiss without Ct order by serving and filing notice of dismissal before responsive pleading or motion of any adverse party or by stipulation

Bank One Wis v Kahl
2002 WI App 312
258 Wis. 2d 937

a. Unilateral dismissal limited to early in proceedings and not available after entry of judgment

b. Unless otherwise stated, dismissal not on merits except if plaintiff previously had action based on or including same claim dismissed in any Ct

C. Dismissal with Ct order

§ 805.04(2)

1) After responsive pleading or motion is filed, matter can be dismissed only upon stipulation or Ct order, on terms and conditions Ct decrees proper

a. Unless specified to contrary, dismissal not on the merits

Haselow v Gauthier
212 Wis. 2d 580
(Ct. App. 1997)

b. If with prejudice, Ct cannot dismiss action ex parte

2) Guidelines for exercise of discretion

St ex rel Freeman
Printing Co v Luebke
36 Wis. 2d 298 (1967)
Obermeier v
Milw Elec Ry & Light
177 Wis. 490 (1922)

a. No absolute right to dismissal

- Ct may grant on good cause shown and on conditions

Russell v Johnson
14 Wis. 2d 406 (1961)

b. Consider prejudice to rights of Defs, third parties, and public

Obermeier v
Milw Elec Ry & Light
177 Wis. 490 (1922)

c. May consider crowded condition of trial calendar and expense to community (e.g., when plaintiff moves for dismissal without prejudice in middle of jury trial)

3) Terms

Smith v St Paul
Fire & Marine Ins
56 Wis. 2d 752 (1973)
Russell v Johnson
14 Wis. 2d 406 (1961)

a. May include witness fees, juror fees, and reasonable Atty fees

Burling v Burling
275 Wis. 612 (1957)

b. Plaintiff may be required to pay Def reasonable expenses incurred in defense of action

§ 805.04(4)

c. May stay proceedings of second action commenced on same claim previously dismissed by plaintiff until payment of costs of first action

§ 802.06(2)

D. Every defense shall be asserted in a responsive pleading except the following, which may be asserted by motion

1) Lack of capacity to sue or be sued

2) Lack of jurisdiction over subject matter

3) Lack of jurisdiction over person

4) Insufficiency of summons or process

5) Failure to state a claim upon which relief can be granted

6) Untimeliness or insufficiency of service

7) Failure to join a party under § 803.03

N States Power Co
v Bugher
189 Wis. 2d 541 (1995)

8) Claim preclusion

ABCG Enters v
First Bank SE
178 Wis. 2d 370
(Ct. App. 1993)

aff'd 184 Wis. 2d 465
(1994)

a. Formerly, res judicata

Kellner v Christian
188 Wis. 2d 525
(Ct. App. 1994)
aff'd 197 Wis. 2d 183
(1995)

9) Notice of claim

Not required in certain actions. **See CV 7, Sec. 9.C.**

10) Statute of limitation

11) Another action pending between same parties for same cause

E. Challenges to service must be raised by motion, before pleading, or in responsive pleading or be waived

1) See also **CV 2, Sec. 1.C.**

§ 802.06(2)(a)4.

2) Insufficiency of summons or process

Definition of a sufficient summons or sufficient process appears in § 801.09, Summons, Contents of; and in § 801.095, Summons Form

§ 802.06(2)(a)5.

3) Untimeliness of service

Honeycrest Farms, Inc
v AO Smith Corp
169 Wis. 2d 596
(Ct. App. 1992)

a. May be raised by motion at time of default judgment

§ 801.02, § 801.09(4)

b. Action not commenced unless Def served with an authenticated copy of summons and complaint within 90 days after filing

§ 801.15(2)(a)

- The 90-day period may not be enlarged even by motion made before 90 days expire

4) Insufficiency of service

§ 801.10(1)
Bendimez v Neidermire
222 Wis. 2d 356
(Ct. App. 1998)
Dietrich v Elliott

190 Wis. 2d 816
(Ct. App. 1995)

a. Any adult resident of State, not a party to action, may serve summons

§ 801.10(4)
CH2M Hill Inc v Black & Veatch
206 Wis. 2d 370
(Ct. App. 1996)

b. If service challenged, proof is server's affidavit, establishing personal service or reasonable diligence for substitute service, or publication

- Proper manner for serving summonses for all classes of Defs is set forth in § 801.11

Loppnow v Bielik
2010 WI App 66, ¶ 15
324 Wis. 2d 803

- Reasonable diligence means plaintiff must not stop short of pursuing a viable lead that, if continued, might reasonably be expected to uncover the address of the person sought

5) Defective service, summons, or complaint

Burnett v Hill
207 Wis. 2d 110 (1997)
Gaddis v LaCrosse Prods, Inc
198 Wis. 2d 396 (1996)

a. Defect may be either technical or fundamental

Studelska v Avercamp
178 Wis. 2d 457
(Ct. App. 1993)

b. Technical or fundamental defects running to personal jurisdiction can be waived if not properly raised by motion or responsive pleading

Am Fam Mut Ins Co v Royal Ins Co
167 Wis. 2d 524 (1992)

c. Technical defects are not grounds for dismissal absent a showing of prejudice

d. Technical defects include

Gaddis v LaCrosse Prods, Inc
198 Wis. 2d 396 (1996)

- Failure to sign summons served with a signed complaint

Am Fam Mut Ins Co v Royal Ins Co
167 Wis. 2d 524 (1992)

- Errors made by those whose duties are beyond the control of the complainant, such as

Schlumpf v Yellick
94 Wis. 2d 504 (1980)

— Erroneous case number stamped on summons and complaint by clerk

Canadian Pac Ltd v Omark-Prentice Hydraulics, Inc
86 Wis. 2d 369
(Ct. App. 1978)

— Omission of statement in summons that Def must answer within 20 days (or within 45 days if Def is State agency or insurance company or if any cause of action raised in complaint is founded in tort)

Burnett v Hill
207 Wis. 2d 110 (1997)

e. Fundamental defect deprives the Ct of personal jurisdiction

- Substantial compliance not sufficient

§ 801.02(1)
Am Fam Mut Ins Co v Royal Ins Co
167 Wis. 2d 524 (1992)
Johnson v Cintas Corp No 2
2012 WI 31
339 Wis. 2d 493

f. Fundamental defect occurs when complainant fails to meet statutory burden by not

- Filing summons and complaint naming proper Def
- Serving authenticated copy of summons and complaint on proper Def
- Serving proper Def within 90 days after filing

Schaefer v Riegelman
2002 WI 18
250 Wis. 2d 494
Rabideau v Stiller
2006 WI App 155
295 Wis. 2d 417

- Properly subscribing complaint pursuant to § 802.05(1), unless omission is properly and promptly cured

Bendimez v Neidermire
222 Wis. 2d 356
(Ct. App. 1998)

- Accomplishing service via an adult resident

§§ 180.0504(1), 801.11(5)
Richards v First Union Sec
2006 WI 55
290 Wis. 2d 620

- Accomplishing service on a correct corporate representative

§ 801.11(4)(a)1.
Bergstrom v Polk Cty

2011 WI App 20
331 Wis. 2d 678

- Accomplishing service on Cty through personal service on Cty Bd chairperson or Cty Clerk

— Mailing summons and complaint only to Cty Atty is fundamental defect

Danielson v
Brody Seating Co
71 Wis. 2d 424 (1976)

g. Despite actual notice, if service of summons fundamentally defective, Ct does not have personal jurisdiction. Fundamentally defective service includes

Am Fam Mut Ins Co
v Royal Ins Co
167 Wis. 2d 524 (1992)

- Service of unauthenticated photocopy of authenticated summons and complaint

Mech v Borowski
116 Wis. 2d 683
(Ct. App. 1983)

- Service of copy of summons and complaint before filing of original

Archambault v
A-C Prod Liab Tr
205 Wis. 2d 400
(Ct. App. 1996)

h. Failure to serve an amended complaint within 90 days

§ 802.06(7), (8)

F. Additional defenses that are or may be waived if not raised by motion or asserted in responsive pleadings

1) Lack of jurisdiction over subject matter

a. Never waived

§ 802.06(8)(c)

b. May be raised at any stage of action by parties or by Ct on own motion

§ 801.04

c. Subject-matter jurisdiction is conferred by constitutions and statutes of Wis and US

Bialk v City of Oak Creek
98 Wis. 2d 469 (1980)

d. Subject-matter jurisdiction cannot be conferred by consent or obtained by waiver

Strong v Brushafer
185 Wis. 2d 812
(Ct. App. 1994)

- Except if egregious or improper motion practice by counsel

Village of Trempealeau
v Mikrut
2004 WI 79
273 Wis. 2d 76

e. Circuit Ct may have subject-matter jurisdiction but not have competence to hear matter

§ 803.03

2) Failure to join indispensable party

§ 802.06(8)(b)

a. May be made in the responsive pleading or by motion made before entry of final pretrial conference order

b. Typically this motion, if granted, will result in an order to join the absent party

Heifetz v Johnson
61 Wis. 2d 111 (1973)

- However, if absent party cannot be joined because statute of limitation has expired as to that party, action may continue and entire action need not be dismissed

§ 802.06(8)(b)

3) Claim preclusion (res judicata)

a. May be made in responsive pleading or by motion made before entry of final pretrial conference order

b. See **Sec. 4.A.**, *infra*

§ 802.06(8)(b)

4) Statute of limitation

May be made in the pleadings or by a motion within time limits established in scheduling order

John Doe 67 v
Archdiocese of Milwaukee
2005 WI 123
284 Wis. 2d 307

5) Failure to state claim upon which relief can be granted

Wilson v
Continental Ins Cos
87 Wis. 2d 310 (1979)

a. May be made in the pleadings or by a motion within time limits established in scheduling order

b. Serves same function as old demurrer, i.e., tests legal sufficiency of the complaint

Anderson v
Continental Ins Co
85 Wis. 2d 675 (1978)

c. Because of notice pleading, complaints are more liberally construed than under prior demurrer cases

Cattau v Nat'l Ins
Servs of Wis, Inc
2019 WI 46, ¶ 4
386 Wis. 2d 515
Strid v Converse
111 Wis. 2d 418, 422–23
(1983)
Data Key Partners v

Permira Advisers LLC
2014 WI 86
356 Wis. 2d 665
John Doe 67C v
Archdiocese of Milwaukee
2005 WI 123, ¶ 19
284 Wis. 2d 307

d. When determining whether a complaint states a claim upon which relief may be granted, Cts must accept as true all facts well pleaded in the complaint and the reasonable inferences therefrom. If the facts reveal an apparent right to recover under any legal theory, they are sufficient as a cause of action. Facts pleaded must be sufficient to plausibly show plaintiff is entitled to relief. Legal conclusions are insufficient to withstand a motion to dismiss

Friends of Kenwood
v Green
2000 WI App 217, ¶ 11
239 Wis. 2d 78

- Document attached to complaint considered part of pleading in determining sufficiency

- If pleading inconsistent with attached document, document prevails

Krueger v AllEnergy
Hixton, LLC
2018 WI App 60, ¶¶ 8–9
384 Wis. 2d 127

- When matters outside of pleadings have been presented, first consider complaint and nothing else at this stage of examination

Soderlund v Zibolski
2016 WI App 6
366 Wis. 2d 579

- A document may be considered according to incorporation by reference doctrine. *See supra* **Sec.** 1.C.1)

§ 803.01

6) Lack of capacity to sue or be sued

a. May be raised within time limits designated under § 803.01

§ 803.01(3)(c)

b. In case of a minor or incompetent individual not represented by Atty, guardian, or GAL, defense may be asserted any time before judgment, or any time within 1 year after disability removed or minor or incompetent individual dies

§ 802.06(2)(a)3., (8)(a)

7) Lack of jurisdiction over the person or property

Studelska v Avercamp
178 Wis. 2d 457
(Ct. App. 1993)

a. Must be raised by motion before pleading, or in responsive pleading, or waived

§ 801.05
FL Hunts, LLC v Wheeler
2010 WI App 10, ¶ 11
322 Wis. 2d 738

b. To have jurisdiction over person or property, Ct must have subject-matter jurisdiction, and one or more jurisdictional grounds in § 801.05 must exist at the time the action is commenced

- In the alternative, defense can waive lack of personal jurisdiction of Ct by general appearance under § 801.06

c. Service must be made upon the person under § 801.11, or dispensed with by general appearance or waiver under § 801.06

§ 801.08

d. All issues of fact and law raised by an objection to personal jurisdiction under § 802.06(2) shall be heard by the Ct, without a jury, in advance of any hearing on merits of case

Kavanaugh Rest Supply, Inc v MCM Stainless Fabricating, Inc
2006 WI App 236
297 Wis. 2d 532

- Evidentiary hearing is necessary, except when parties have stipulated to a set of facts

Schaefer v Riegelman
2002 WI 18
250 Wis. 2d 494
Studelska v Avercamp
178 Wis. 2d 457
(Ct. App. 1993)

e. Improper authentication or subscription of complaint a fundamental defect, depriving Ct of personal jurisdiction

§ 802.06(2)(a)10.

8) Another action pending between same parties for same cause

a. Dismissal appropriate only if the other action is pending in Wis Cts

Wood v Lake
13 Wis. 94 (*84) (1860)

b. Action pending in Cts of another jurisdiction does not require dismissal; Ct may stay Wis action upon grounds of *forum non conveniens*

Winner v Kuehn
97 Wis. 394 (1897)

c. Dismissal also not appropriate if previous action has been dismissed or discontinued

G. Standing and Mootness

Reetz v Advocate Aurora Health, Inc
2022 WI App 59, ¶ 7
405 Wis. 2d 298

1) Standing in Wis is determined by:

a. Personal interest in the controversy;

b. Injury or adverse effect; and

c. Judicial policy that "calls for protecting the interest of the party whose standing has been challenged"

Krier v Vilione
2009 WI 45, ¶ 20
317 Wis. 2d 288

The law of standing should be liberally construed

Marathon Cty v DK
(In re Condition of DK)
2020 WI 8, ¶ 19
390 Wis. 2d 50

2) Mootness is a doctrine of judicial restraint. An issue is moot if its resolution will have no practical effect on an underlying controversy. Cts generally decline to reach moot issues

3. Motion for Summary Judgment

A. Timeliness/general procedures

City of La Crosse
v Jiracek Cos
108 Wis. 2d 684
(Ct. App. 1982)

1) Summary-judgment motion not authorized before pleadings are complete under § 802.08

§ 802.08(1)

2) Both parties may bring motion for summary judgment

Powalka v St Mut Life
Assurance Co
53 Wis. 2d 513 (1971)

When both sides move for summary judgment and no genuine issue of material fact appears to exist, the parties concede that the case can be resolved as a matter of law

St v Ryan
2012 WI 16
338 Wis. 2d 695
St v Schneck
2002 WI App 239
257 Wis. 2d 704

3) Summary judgment not available in civil forfeiture matters generally

§ 802.08(1)

4) Must be brought within 8 months after filing of summons and complaint or within time set within scheduling order under § 802.10

1st Nat'l Bank v Hansen
84 Wis. 2d 422 (1978)

5) HOWEVER, Ct may consider and grant even an untimely motion for summary judgment, if the motion is meritorious and disposes of the case

Reason: Purpose of time limit is to prevent delay. Dispositive summary-judgment motion does not delay case; rather, it facilitates early disposition

§ 802.08(2)

6) Unless earlier time specified, motion shall be served at least 20 days before hearing and adverse party shall respond at least 5 days before hearing

Hunter v AES Consultants, Ltd 2007 WI App 42 300 Wis. 2d 213 *withdrawn in part on other grounds by Hefty v Strickhouser* 2008 WI 96, ¶ 50, 312 Wis. 2d 530

a. If conflict, statutory time limits trump local rule

Hefty v Strickhouser 2008 WI 96 312 Wis. 2d 530

b. However, a scheduling order can trump the time limits in § 802.08(2) and set different time limits, but scheduling order cannot merely incorporate local rule that is void because it differs from statutory time limits

7) Bankruptcy stay tolls time for summary-judgment motion

8) Extending time for bringing summary-judgment motion

a. Counsel can request more than statutory 8 months at scheduling conference

§ 801.15(2)(a)

b. Party can move to extend time before time expires upon showing of good cause

§ 801.15(2)(a)

c. After expiration of time set by statute or by scheduling order, party must show excusable neglect to get extension

B. Summary-judgment methodology

1) Plaintiff's summary-judgment motion

Green Spring Farms v Kersten 136 Wis. 2d 304 (1987)

a. Examine complaint for sufficiency of claim stated

- If complaint fails to state a claim, it can be dismissed with the right to replead being liberally granted

b. Examine answer to see whether it joins genuine issues of fact

- If answer fails to join issues, consider whether plaintiff is entitled to judgment on pleadings

Palisades Collection LLC v Kalal
2010 WI App 38
324 Wis. 2d 180

c. Examine plaintiff's affidavits and supporting materials for sufficiency

- Affiant's firsthand knowledge must be demonstrated
- Evidentiary, not ultimate or conclusory facts must be set forth
- Must be in a form as would be admissible at trial
- Foundation of hearsay exception must be laid, if necessary for admission in evidence
- Qualifications of expert must be stated if expert opinion affidavit is offered

d. Determine whether plaintiff has proved case against Def

- Plaintiff must show a prima facie case for recovery against Def

Jones v Sears Roebuck & Co
80 Wis. 2d 321 (1977)

- Plaintiff's summary-judgment motion is defeated if plaintiff fails to prove all elements of claim, or if competing inferences flow from facts shown by plaintiff

e. If plaintiff's materials pass muster, examine Def's response to summary-judgment motion

§ 802.08(3)
Maynard v Port Publ'ns, Inc
98 Wis. 2d 555 (1980)

- Def may not rely on allegations of answer to oppose summary-judgment motion because answer is not an evidentiary document

Gouger v Hardtke
167 Wis. 2d 504 (1991)

- Def may rely on inconsistencies in plaintiff's pleadings to establish issue of material fact
- Def's affidavits must be in evidentiary form as admissible at trial

Transp Ins Co v Hunzinger Constr Co
179 Wis. 2d 281
(Ct. App. 1993)

Schroeder, Gedlen, Riester & Moerke v Schoessow 103 Wis. 2d 380 (Ct. App. 1981) *rev'd on other grounds* 108 Wis. 2d 49 (1982)

- To defeat plaintiff's summary-judgment motion, Def must

— Establish disputed issues of material fact requiring trial;

— Convince Ct there are competing reasonable inferences leading to opposite results; or

— Establish that law does not support plaintiff's recovery even on undisputed facts

Williams v District Council of Madison Inc 2021 WI App 62, ¶ 10 399 Wis. 2d 174

- A factual dispute is genuine if a reasonable jury could return a verdict in favor of nonmoving party, and the dispute is material if it could affect the outcome of trial under applicable legal standards

Manor v Hanson 120 Wis. 2d 582 (Ct. App. 1984) *rev'd on other grounds* 123 Wis. 2d 524 (1985)

- Ct may grant summary judgment to party who did not move for it if record supports summary judgment for that nonmoving party

2) Def's summary-judgment motion

Schroeder, Gedlen, Riester & Moerke v Schoessow 103 Wis. 2d 380 (Ct. App. 1981) *rev'd on other grounds* 108 Wis. 2d 49 (1982)

a. Examine complaint for sufficiency of claim stated

- If complaint fails to state a claim, it can be dismissed with the right to replead being liberally granted

Barillari v City of Milwaukee 186 Wis. 2d 415 (Ct. App. 1994) *rev'd on other grounds* 194 Wis. 2d 247 (1995)

- Claim should be dismissed only if under no conditions can the plaintiff recover

b. Examine answer to see whether it joins genuine issues of fact

- If answer fails to join issues, consider whether plaintiff entitled to judgment on pleadings

c. Examine Def's affidavits and supporting material for sufficiency of form

- Affiant's firsthand knowledge must be demonstrated
- Evidentiary, not ultimate or conclusory, facts must be set forth
- Must be in a form as would be admissible at trial
- Foundation for hearsay exception must be laid, if necessary for admissibility
- Qualifications of expert must be stated if expert opinion affidavit is offered

Krezinski v Hay
77 Wis. 2d 569 (1977)

d. Determine whether Def has proved facts necessary to establish defense to plaintiff's claim as a matter of law

Preloznik v
City of Madison
113 Wis. 2d 112
(Ct. App. 1983)

- Defense shown must defeat plaintiff's claims as a matter of law

e. If Def's materials pass muster, examine plaintiff's response to summary-judgment motion

§ 802.08(3)
Maynard v
Port Publ'ns, Inc
98 Wis. 2d 555 (1980)

- Plaintiff may not rely on allegations of complaint to oppose Def's summary-judgment motion because complaint not evidentiary

Gouger v Hardtke
167 Wis. 2d 504 (1991)

- Plaintiff may rely on inconsistencies in Def's pleadings to establish issue of material fact

Kavon Enters v
Am Universal Ins Co
74 Wis. 2d 53 (1976)

- Counter-affidavits required of plaintiff only if defense has established by its affidavits those facts required to defeat cause of action asserted by plaintiff
- Plaintiff's affidavits must be in evidentiary form as would be admissible at trial

Schroeder, Gedlen, Riester & Moerke v Schoessow
103 Wis. 2d 380
(Ct. App. 1981)
rev'd on other grounds
108 Wis. 2d 49 (1982)

- To defeat Def's summary-judgment motion, plaintiff must

  — Establish disputed issues of material fact requiring trial

  — Convince Ct there are competing reasonable inferences leading to opposite results, or

  — Establish that law does not support Def's asserted defense(s) even on undisputed facts

f. Plaintiff need not produce proof of its entire cause of action against Def to defeat defense summary-judgment motion

- Plaintiff need only produce sufficient evidence to bring an element of the defense into dispute to entitle plaintiff to trial

Chase Lumber & Fuel Co v Chase
228 Wis. 2d 179
(Ct. App. 1999)

g. Generally, when both parties move for summary judgment, it is equivalent to stipulation of fact, permitting Ct to decide case on legal issues

§ 802.08(6)
Manor v Hanson
120 Wis. 2d 582
(Ct. App. 1984)
rev'd on other grounds
123 Wis. 2d 524 (1985)

h. Ct may grant summary judgment to party who did not move for it if record supports summary judgment for nonmoving party

C. Burden of proof on moving party

Kraemer Bros v US Fire Ins Co
89 Wis. 2d 555 (1979)

1) Moving party must prove its right to judgment so clearly as to leave no room for controversy

§ 802.08(3)
Transp Ins Co v Hunzinger Constr Co
179 Wis. 2d 281
(Ct. App. 1993)

2) Proof must set forth evidentiary facts as would be admissible in evidence

Cameron v City of Milw
102 Wis. 2d 448 (1981)

3) All material facts must be present in the record

Summary-judgment affidavits may refer to documents already of record

Hilkert v Zimmer
90 Wis. 2d 340 (1979)

4) All material facts must be undisputed; only irrelevant facts may be disputed

Maynard v
Port Publ'ns, Inc
98 Wis. 2d 555 (1980)

5) The undisputed material facts must not give rise to competing inferences supporting conflicting results

a. Summary judgment should not be granted if reasonable persons could reach reasonable, but differing inferences and results from the undisputed facts

Kraemer Bros v
US Fire Ins Co
89 Wis. 2d 555 (1979)

b. Competing inferences in moving party's materials must be viewed in light most favorable to party opposing motion for summary judgment

Heck & Paetow Claim
Serv, Inc v Heck
93 Wis. 2d 349 (1980)

6) Any reasonable doubt as to existence of genuine issue of material fact must be resolved against moving party

Kenefick v Hitchcock
187 Wis. 2d 218
(Ct. App. 1994)

Issue is genuine if evidence is such that a reasonable jury could find for the nonmoving party

D. Clarity of law necessary for summary-judgment motion

St Comm'rs of Bd of
Public Lands v Thiel
82 Wis. 2d 276 (1978)

1) Fact that one party urges Ct to expand an existing rule of law or propound a new rule of law does not preclude granting summary judgment

Taterka v Ford Motor Co
86 Wis. 2d 140 (1978)

2) Ct may decide a point of law not previously decided, but need not do so, unless the legal issue is capable of resolution in a factual vacuum

Maynard v
Port Publ'ns, Inc
98 Wis. 2d 555 (1980)

3) Existence of a new or difficult issue of law does not render summary judgment inappropriate in and of itself

E. Summary judgment and negligence actions

Murphy v Columbus McKinnon Corp
2022 WI 109, ¶ 51
405 Wis. 2d 157

1) Negligence action not ordinarily resolved by summary judgment

2) Ct must determine that no properly instructed, reasonable jury could find, based on facts presented, that Def failed to exercise ordinary care

3) Summary judgment only appropriate when inference of negligence so weak that it can be negated by competing inference of non-negligence

If Def offers inconclusive evidence of non-negligent cause, Ct should not weigh probabilities of negligence created by competing inferences

Cefalu v Cont'l W Ins Co
2005 WI App 187, ¶ 12
285 Wis. 2d 766

4) Summary judgment appropriate when public policy considerations preclude liability

F. Latitude of Ct to grant or deny summary-judgment motion

Wis Envtl Decade, Inc v PSC
79 Wis. 2d 161 (1977)

1) Summary judgment is not available in administrative review proceedings

Wright v Hasley
86 Wis. 2d 572 (1979)

2) Summary judgment must be denied unless there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law

Ceplina v South Milw Sch Bd
73 Wis. 2d 338 (1976)

3) It is an erroneous exercise of discretion to incorrectly decide a legal issue, or to decline to consider a legal issue that is capable of resolution in a factual vacuum

Delmore v Am Fam Mut Ins Co
118 Wis. 2d 510 (1984)

4) If the record is adequately made and presents a legal question, Trial Ct may grant summary judgment even in areas that have sometimes been termed "inappropriate" for summary judgment

§ 802.06(2)

5) Motion to dismiss for failure to state a claim, claim preclusion (res judicata), or statute of limitation is converted to motion for summary judgment if accompanied by affidavits

Camacho v Trimble Irrevocable Tr
2008 WI App 112, ¶¶ 7–10
313 Wis. 2d 272

6) Ct can and should do independent legal research on issues before Ct and need not disclose results of its research before rendering decision. Competent judge uses briefs as starting line and not finish line for judge's own independent research

G. Permissible types of proof on summary judgment

1) Affidavits in proper evidentiary form

Bd of Regents
v Mussallem
94 Wis. 2d 657 (1980)

a. Must be based on personal knowledge

Transp Ins Co
v Hunzinger Constr Co
179 Wis. 2d 281
(Ct. App. 1993)

b. Affidavits specifically negating opponent's claim not necessary

Kraemer Bros v
US Fire Ins Co
89 Wis. 2d 555 (1979)

c. Only evidentiary facts as would be admissible at trial are to be considered

Krezinski v Hay
77 Wis. 2d 569 (1977)

- Affidavits made on information and belief not sufficient

- This defect may be treated as waivable procedural irregularity if not raised in Trial Ct

Preloznik v
City of Madison
113 Wis. 2d 112
(Ct. App. 1983)

d. Opinions of experts may be included in affidavits, so long as evidentiary foundation for admission of such opinions established

- Qualifications and areas of expertise must be established

Hopper v City of Madison
79 Wis. 2d 120 (1977)

e. Recitations of complaint, statements of ultimate fact, and conclusions of law fail to meet statutory requirements and cannot support a motion for summary judgment

Hopper v City of Madison
79 Wis. 2d 120 (1977)

f. Affidavits or portions of affidavits made by persons without personal knowledge, and anything other than evidentiary facts are to be disregarded

g. Conclusions are not sufficient

Snider v N States Power Co
81 Wis. 2d 224 (1977)

- An affidavit stating that work was "ultra-hazardous" does not raise an evidentiary fact, but is merely conclusory and insufficient to raise a material fact issue

h. Atty's affidavits

- Should be scrutinized closely

Hopper v City of Madison
79 Wis. 2d 120 (1977)

- Atty's summary of evidence and his or her conclusions about it cannot be considered in support of summary-judgment motion

Ruchti v Monroe
83 Wis. 2d 551 (1978)
802.08(3)

- Atty's affidavit stating a conclusion of law is not an evidentiary fact as required by summary-judgment rule

SCR 20:3.7

- Under Code of Professional Responsibility, Atty must not act as advocate at trial if Atty is likely to be necessary witness on contested matter

- Attys' affidavits identifying and attaching portions of depositions and answers to interrogatories on file are likely uncontested matters, about which Attys may file affidavits under Code of Professional Responsibility

Palisades Collection LLC v Kalal
2010 WI App 38
324 Wis. 2d 180

2) Copies of papers referred to in affidavits, provided proper evidentiary foundation is established (e.g., business records exception to hearsay rule)

3) Admissions of a party opponent

Bank of Two Rivers v Zimmer
112 Wis. 2d 624 (1983)

4) Party's failure to respond to request for admission

5) Self-authenticating documents

6) Matters subject to judicial notice, if provided to Ct in form of which Ct can take judicial notice

7) Depositions

Gillund v
Meridian Mut Ins Co
2010 WI App 4, ¶¶ 37–38
323 Wis. 2d 1

Party using deposition shall specify which portions to be relied on, or Ct will disregard

Yahnke v Carson
2000 WI 74
236 Wis. 2d 257

H. Sham affidavit rule

1) An affidavit directly contradictory to prior deposition testimony is generally insufficient to create genuine issue of fact, unless contradiction adequately explained. To determine if adequate, Ct to consider

   a. Whether deposition afforded opportunity for direct and cross-examination of witness

   b. Whether witness had access to pertinent evidence or information before deposition, or whether affidavit was based on newly discovered evidence not known or available at time of deposition

   c. Whether earlier testimony reflects confusion, lack of recollection, or other legitimate lack of clarity that affidavit attempts to explain

I. No authority for oral testimony on summary-judgment motions

1) Oral testimony involves the assessment of credibility of witness offering testimony

2) Credibility affects how Ct decides contested issues

§ 802.08
Kremers-Urban Co v
Am Emps Ins Co
119 Wis. 2d 722 (1984)

3) Ct does not decide contested issues on summary judgment, but merely decides whether there is an issue of fact in dispute requiring trial

Continental Cas Co
v MMSD
175 Wis. 2d 527
(Ct. App. 1993)

J. Motion for reconsideration of summary judgment

1) Not available under § 805.17(3)

2) Is available under § 802.08

4. Motion for Claim or Issue Preclusion

A. Claim preclusion (res judicata)

Menard, Inc v
Liteway Lighting Prods
2005 WI 98
282 Wis. 2d 582
Pasko v City of
Milwaukee
2002 WI 33
252 Wis. 2d 1
ABCG Enters v
First Bank SE
184 Wis. 2d 465 (1994)

1) Claim preclusion (res judicata) doctrine makes judgment conclusive in all subsequent actions between same parties or privies as to all matters that were litigated or that might have been litigated in previous action

Barber v Weber
2006 WI App 88, ¶ 11
292 Wis. 2d 426

When administrative agency acts in judicial capacity, doctrine may be applicable if required factors exist

2) Three factors required

Hull v Glewwe
2019 WI App 27
388 Wis. 2d 90

a. Identity of parties or their privies

- Privity exists when person is so identified in interest with a party that same legal right is represented as to subject matter

Barbian v Lindner
Bros Trucking Co
106 Wis. 2d 291 (1982)

b. Identity of causes of action

DSG Evergreen
Fam Ltd P'ship v
Town of Perry
2020 WI 23
390 Wis. 2d 533
Teske v
Wilson Mut Ins Co
2019 WI 62
387 Wis. 2d 213

- Transactional analysis required

c. Final judgment on the merits

Kruckenberg v Harvey
2005 WI 43
279 Wis. 2d 520

NOTE: Fundamental fairness analysis is not appropriate.

Nat'l Operating LP v Mut Life Ins Co
2001 WI 87, ¶ 68
244 Wis. 2d 839

3) Declaratory judgment binding only as to matters actually decided, not matters that might have been litigated

See **CV 46**, **Declaratory Judgments**, this Benchbook

4) Exceptions

Kruckenberg v Harvey
2005 WI 43
279 Wis. 2d 520
Sopha v Owens-Corning Fiberglas Corp
230 Wis. 2d 212, 236
(1999)

a. Limited to special circumstances in which policies favoring preclusion are trumped by other significant policies

Pasko v City of Milwaukee
2002 WI 33
252 Wis. 2d 1

- Consider whether claim preclusion will result in unfairness to nonparty

- Apply so as to not deprive party of full and fair determination of issues

Wickenhauser v Lehtinen
2007 WI 82, ¶ 23
302 Wis. 2d 41

b. Claim preclusion does not act as a compulsory counterclaim rule

- Does not bar subsequent suit by Def who chose not to counterclaim in first action

Stericycle, Inc v City of Delavan, 120 F3d 657
(7th Cir 1997)

c. Declaratory judgment will not have preclusive effect on later action for injunction or damages if solely declaratory relief sought in first action

B. Issue preclusion (collateral estoppel) limits relitigation of issues actually litigated in previous action

Michelle T v Crozier
173 Wis. 2d 681 (1993)

1) Apply fundamental fairness test

a. Review of prior judgment available?

b. Significant distinction between issue previously decided and that issue's relationship to current dispute?

c. Question of law involving distinct claims or intervening shifts in the law?

d. Quality or extensiveness of prior proceeding

e. Burden of proof or persuasion shifted?

f. Public policy and individual circumstances make it unfair?

Precision Erecting, Inc v M&I Bank
224 Wis. 2d 288
(Ct. App. 1999)

Paige KB v Steven GB
226 Wis. 2d 210 (1999)

2) Issue preclusion is available within same action as well as subsequent actions; identity of parties not necessary

a. Issue fully litigated in criminal proceeding not conclusive in subsequent civil proceeding unless privity or identity of interest invested such that there was an opportunity for full and fair litigation of the issue

Mrozek v Intra Fin Corp
2005 WI 73
281 Wis. 2d 448
Robinson v City of W Allis
2000 WI 126
239 Wis. 2d 595

b. No preclusive effect exists in subsequent civil action for guilty or no contest plea or read-in of charge that occurred in prior criminal matter

Harborview Office Ctr, LLC v Nash
2011 WI App 109
336 Wis. 2d 161

c. Evidence/issues assumed for summary judgment but not actually litigated are not precluded and may be further litigated

Jensen v Milwaukee Mut Ins Co
204 Wis. 2d 231
(Ct. App. 1996)

3) Offensive use: Plaintiff seeks to foreclose Def from litigating an issue Def previously litigated unsuccessfully with another party

Gould v DHSS
216 Wis. 2d 356
(Ct. App. 1998)

a. Nonmutual, offensive use of issue preclusion generally not available against governmental agency

Reuter v Murphy
2000 WI App 276
240 Wis. 2d 110

b. Relitigation not precluded when issue is one of law and factual claims are substantially different

Mayonia MM v Keith N (Paternity of Mayonia MM)
202 Wis. 2d 460
(Ct. App. 1996)

4) Defensive use: Def seeks to prevent plaintiff (or one with sufficient identity of interest) from asserting a claim that plaintiff (or one with sufficient identity of interest) has previously litigated and lost

CV 7: STATUTES OF LIMITATION/NOTICES OF CLAIM

1. Purpose

§ 893.04

A. Specifies the period within which a cause of action (C/A) must be commenced after it has accrued

Maryland Cas Co v Beleznay
245 Wis. 390 (1944)

B. Limitation of action is a right as well as a remedy, extinguishing the right to a remedy on one side and creating a right of "repose" on the other

Sopha v Owens-Corning Fiberglas Corp
230 Wis. 2d 212 (1999)

C. Statute of limitation (S/L) is public policy determination

1) Discourage stale and fraudulent claims

2) Allow meritorious claims

2. Statutes of Limitation and Statutes of Repose

Aicher v Wis Patients Comp Fund
2000 WI 98, ¶ 26
237 Wis. 2d 99

A. S/L establishes time frame within which claim must be initiated after C/A actually accrues. (See Sec. 3 below for discussion of accrual)

Aicher v Wis Patients Comp Fund
2000 WI 98, ¶ 26
237 Wis. 2d 99

B. Statute of repose limits period based on date of act or omission, and can toll before injury is discovered or has occurred. Bears no relation to accrual of C/A

§ 893.89
Wenke v Gehl Co
2004 WI 103
274 Wis. 2d 220
Landis v Physicians Ins Co

2001 WI 86
245 Wis. 2d 1

1) "Statute of repose" is largely a judicial label for a particular type of limitation on actions

Aicher v Wis Patients Comp Fund
2000 WI 98, ¶ 26
237 Wis. 2d 99

2) Statutes of repose limit the period within which an action may be brought based on the date of the act or omission

Kohn v Darlington Cmty Schl
2005 WI 99
283 Wis. 2d 1
Aicher v Wis Patients Comp Fund
2000 WI 98
237 Wis. 2d 99

3) Statutes of repose are constitutional

4) Examples of statutes of repose

§ 893.55(1m)(b)
§ 893.56

a. Medical malpractice action to be brought no more than five years from date of negligent act or omission; extended for minors until minor reaches age of 10

Storm v Legion Ins Co
2003 WI 120
265 Wis. 2d 169

- But five-year statute of repose in former § 893.55(1)(b) (now § 893.55(1m)(b)) does not apply to injury accrual rule in former § 893.55(1)(a) (now § 893.55(1m)(a))

Landis v Physicians Ins Co
2001 WI 86
245 Wis. 2d 1

- Like medical malpractice S/L, statute of repose is tolled by request for mediation

§ 893.89
Mair v Trollhaugen Ski Resort
2006 WI 61
291 Wis. 2d 132
Kohn v Darlington Cmty Sch
2005 WI 99
283 Wis. 2d 1
Kalahari Dev, LLC v Iconica, Inc
2012 WI App 34
340 Wis. 2d 454

b. Claims for injuries, including safe-place claim, resulting from improvements to real property asserted more than 7 years after substantial completion of improvement are barred

Peter v Sprinkmann Sons Corp

2015 WI App 17, ¶ 14
360 Wis. 2d 411

- Mesothelioma diagnosis date, not exposure date to asbestos, gives rise to legally actionable damages

Peter v
Sprinkmann Sons Corp
2015 WI App 17,
¶¶ 22–23
360 Wis. 2d 411

- Repair and maintenance work is not an improvement or permanent addition under statute of repose

§ 893.37

c. Action against professional land surveyor for negligent survey to be brought no more than 6 years after completion of survey

Mueller v TL90108, LLC
2020 WI 7
390 Wis. 2d 34

d. Cause of action for replevin of personal property accrues at the time of the wrongful detention, not the wrongful taking or conversion

Tomczak v Bailey
218 Wis. 2d 245 (1998)

5) *Hansen* "discovery rule" (see **Sec. 3.B.**, *infra*) cannot be applied to a statute of repose

Johnson v Masters
2013 WI 43, ¶ 3
347 Wis. 2d 238

6) If a statute precludes enforcement of a provision in a judgment, statute of repose cannot begin to run as to that provision until legislature changes law so provision can be carried out

3. Accrual of Cause of Action

Sopha v Owens-Corning
Fiberglas Corp
230 Wis. 2d 212 (1999)
Pritzlaff v
Archdiocese of Milwaukee
194 Wis. 2d 302 (1995)

A. General requirements for accrual of C/A

1) Existence of claim capable of present enforcement

Pritzlaff v
Archdiocese of Milwaukee
194 Wis. 2d 302 (1995)

a. Requires harm that has already occurred or is "reasonably certain" to occur in the future

Pritzlaff v
Archdiocese of Milwaukee
194 Wis. 2d 302 (1995)

b. Action can accrue even if amount and extent of damages uncertain

2) Suable party against whom it may be enforced

3) Party who has the present right to enforce it

B. Accrual of tort C/A

Paul v Skemp
2001 WI 42
242 Wis. 2d 507

1) Requires both a negligent act/omission and a resultant injury

2) Three possible times when Ct may find that C/A has accrued

a. Time of negligent act or omission

b. Time of injury to the plaintiff

c. Time when plaintiff discovers the injury

Sopha v Owens-Corning Fiberglas Corp
230 Wis. 2d 212 (1999)
Segall v Hurwitz
114 Wis. 2d 471
(Ct. App. 1983)

3) If act/injury/discovery not simultaneous, look to judicially created rules

a. Single C/A rule

- All injuries caused by single transaction or series of transactions by tortfeasor are part of single C/A; later injury from same tortious act does not restart running of S/L

b. Discovery rule (see **Sec. B.**4) below)

c. Rule limiting recovery of damages for reasonably certain consequences

Ladd v Uecker
2010 WI App 28,
¶¶ 11–12
323 Wis. 2d 798

d. Single publication rule—in defamation actions

- Republication of allegedly defamatory statement does not affect S/L

Laughland v Beckett
2015 WI App 70, ¶ 18
365 Wis. 2d 148

- Adding derogatory posts on Facebook demonstrates continuing course of conduct, allowing S/L to run from last date of publication

Sawyer v Midelfort
227 Wis. 2d 124 (1999)
Borello v US Oil Co
130 Wis. 2d 397 (1986)
Hansen v AH Robins, Inc
113 Wis. 2d 550 (1983)

4) "Discovery rule"—C/A does not accrue until nature and cause of injury and Def's identity and role in claim are known or ought to be known by claimant

Christ v
Exxon Mobil Corp
2015 WI 58, ¶ 33
362 Wis. 2d 668

a. Applies to both survival claims and wrongful death claims

Baldwin v Badger
Mining Corp
2003 WI App 95
264 Wis. 2d 301

b. Test is whether claimant exercised "reasonable diligence" in discovering C/A

Gumz v Northern States
Power Co
2007 WI 135, ¶ 49
305 Wis. 2d 263

- Often presents questions of fact appropriate for jury

Claypool v Levin
209 Wis. 2d 284 (1997)

c. Perceived viability of claim does not negate discovery

Schmidt v Northern
States Power Co
2008 WI 136, ¶ 44
305 Wis. 2d 538

- Once an injury discovered, it cannot be "undiscovered"

Hansen v AH Robins, Inc
113 Wis. 2d 550, 560
(1983)

d. Applies to "all tort actions other than those already governed by a legislatively created discovery rule"

Doe v Archdiocese
of Milwaukee
211 Wis. 2d 312 (1997)

e. Note: Claim of repressed memory does not delay accrual of claim

Robinson v
Mt Sinai Med Ctr
137 Wis. 2d 1 (1987)
Forbes v Stoeckl
2007 WI App 151
303 Wis. 2d 425
Westphal v EI du Pont
de Nemours & Co

192 Wis. 2d 347
(Ct. App. 1995)

5) "Continuum of negligence rule" may extend S/L in medical malpractice actions. Statute runs from last date of negligent conduct. Elements require:

a. Continuum of care

b. Continuum of negligent medical care

c. Medical care related to single condition

d. Precipitating factor in continuum was original negligent act

§ 893.43

C. Accrual of contract C/A

CLL Assocs v
Arrowhead Pac Corp
174 Wis. 2d 604 (1993)

1) Accrues at time of breach whether or not facts are known by plaintiff

Dairyland Power
Coop v Amax Inc
700 FSupp 979
(WD WI 1986)

a. When UCC applies, C/A claiming unconscionability of contract accrues when contract entered into rather than when dispute occurs

§ 402.725(2)

b. When UCC applies, breach of warranty ordinarily occurs at time of delivery

Selzer v Brunsell Bros
2002 WI App 232
257 Wis. 2d 809

- But, if warranty explicitly extends to future performance of goods, C/A accrues when breach is or should have been discovered

§ 893.43(2)

2) Accrues on the date there is final resolution of the underlying cause of action against the tortfeasor for purposes of commencing UIM and UM claims

4. Commencement of Action

§ 893.02
§ 801.16(1)

A. When summons and complaint naming Def are filed with Clerk of Ct; and

§ 801.11(1)(c)
§ 801.02(1)

B. When authenticated copies of summons and complaint are served within 90 days after filing (unless plaintiff proceeds by publication)

Am Fam Mut Ins Co
v Royal Ins Co
167 Wis. 2d 524 (1992)

1) Failure to serve authenticated copies within 90 days after filing deprives Ct of jurisdiction

Lak v
Richardson-Merrell, Inc
100 Wis. 2d 641 (1981)
Lavine v Hartford
Accident & Indem Co
140 Wis. 2d 434
(Ct. App. 1987)

2) However, if action commenced with fictitious Def, and true Def learned and served within 90 days after running of S/L, and nonprejudice shown, Ct has jurisdiction

C. *See also* CV 2

§ 893.825

D. In an action in which a statute is claimed unconstitutional, preempted by federal law, or construction otherwise challenged, the speaker of the assembly, the president of the senate, and the senate majority leader shall be served with a copy of the proceeding

5. Tolling/Extending Statutes of Limitation/Relation Back

A. Events triggering tolling of statute

§ 893.13(2)
Johnson v Crawford Cty
195 Wis. 2d 374
(Ct. App. 1995)

1) Commencement of the action. (Tolling is from commencement of action through final disposition including running of appeal time)

§ 893.13(3)

a. BUT, if commencement of action is less than 30 days before running of S/L and is later dismissed, not on merits, period of limitation is extended to 30 days

Colby v Columbia Cty
202 Wis. 2d 342 (1996)

b. Premature filing of complaint against municipality before notice of claim denied is NOT "commencement of action" that tolls S/L

See § 893.80(1g)

- However, disallowance period effectively extends S/L for additional 120 days

§ 893.19(1)

2) Def is outside Wis and not subjected to personal jurisdiction of Wis Cts under § 801.05

§ 893.19(2)

a. If C/A accrues when Def out of state, S/L begins to run when Def returns to State

- But, no tolling if neither plaintiff nor Def is resident of Wis at time action accrues

- No tolling if Def subjected to personal jurisdiction of Wis Cts

b. Statute tolls if Def departs from and resides outside Wis after C/A accrues

c. If Def foreign corporation has registered agent in Wis, statute not tolled except for period that registered agent departs from and resides outside Wis

§ 893.16

3) Claimant is under disability when C/A accrues

§ 893.16(1)
Haferman v St Clare Healthcare Found
2005 WI 171
286 Wis. 2d 621

a. Minority: Action must be brought no later than two years after minor's 18th birthday (except for actions against health-care providers)

§ 893.16(1)
Storm v Legion Ins Co
2003 WI 120
265 Wis. 2d 169

b. Mental illness: Requires factual finding that person functionally unable to understand legal claim or assert legal rights. Period of limitation extended for the shorter of

- 2 years after the disability ceases

- 5 years after applicable S/L would have run

§ 893.16(3)
Carlson v Pepin Co
167 Wis. 2d 345
(Ct. App. 1992)

c. Disability must have existed at time of injury

Kilaab (Khan) v Prudential Ins Co
198 Wis. 2d 699
(Ct. App. 1995)

d. If both disability tolling statute and discovery rule apply, plaintiff only entitled to benefit of one

Walberg v St Francis Home, Inc
2005 WI 64
281 Wis. 2d 99

e. Death terminates legal disability

§ 893.21

4) Plaintiff or Def is exempt from service of process because in military service

§ 893.12

5) Settlement or advance payment is made to injured person. (Extends S/L for 3 years after date of last payment. Applies only to payments on account of injury to person, death, or injury to property)

Gurney v
Heritage Mut Ins Co
188 Wis. 2d 68
(Ct. App. 1994)

To toll S/L, payment must be related to fault or liability, not just medical payment

6) Death

§ 893.22

a. Death of claimant

Walberg v
St Francis Home, Inc
2005 WI 64
281 Wis. 2d 99

- S/L extended for 1 year after death if claim has less than 1 year remaining on period of limitation at time of death

§ 893.22

b. Death of potential Def

- S/L extended for 1 year after domiciliary letters issued, authorizing administration of Def's estate

§ 893.23

7) Commencement of action stayed by law

§ 655.44
Young v Aurora Med Ctr
2004 WI App 71
272 Wis. 2d 300

8) Request for prefiling mediation in medical malpractice action

Liberty Credit Servs, Inc
v Quinn
2004 WI App 202
276 Wis. 2d 826

9) In contract action, payment on obligation tolls statute and sets it running from date of payment

§ 631.83(5)

10) Arbitration proceedings prescribed by insurance policy or by law or as agreed to by the parties

Thom v
OneBeacon Ins Co
2007 WI App 123,
¶¶ 11–18
300 Wis. 2d 607

May only apply to first-party claims by insureds against insurers

B. Relation-Back Doctrine—see CV 5, Sec. 2.B., Amendment of Pleadings

6. Borrowing Foreign Statutes of Limitation

§ 893.07

A. "Foreign cause of action" defined

Guertin v Harbour Assurance Co
141 Wis. 2d 622 (1987)

1) For tort actions, injury received outside Wis

Paynter v ProAssurance Wis Ins Co
2018 WI App 27, ¶ 2
381 Wis. 2d 239
aff'd in part, rev'd in part, 2019 WI 65,
387 Wis. 2d 278

2) For injury occurring during same course of action in multiple states, location of first injury controls whether C/A is "foreign"

Paynter v ProAssurance Wis Ins Co
2019 WI 65, ¶ 73
387 Wis. 2d 278

In negligent misdiagnosis cases, "injury" occurs when greater harm as a result of the misdiagnosis exists

Abraham v Gen Cas Co
217 Wis. 2d 294 (1998)

3) For contract actions, final significant event giving rise to suable claim occurs outside Wis

B. Applicable S/L for foreign C/A brought in Wis

§ 893.07(1)

1) If foreign period of limitation has expired, no action may be maintained in Wis

§ 893.07(2)

2) If action brought on foreign C/A in Wis and applicable Wis period of limitation has expired, no C/A can be maintained in Wis even if foreign period of limitation has not expired

Wenke v Gehl Co
2004 WI 103
274 Wis. 2d 220

3) "Foreign period of limitation," for purposes of borrowing statute, includes both S/Ls and statutes of repose

Johnson v Johnson
179 Wis. 2d 574
(Ct. App. 1993)

4) Tolling statutes not borrowed

7. Pleading Statutes of Limitation as a Defense

§ 802.02(3)
Robinson v Mt Sinai Med Ctr
137 Wis. 2d 1 (1987)

A. S/L is affirmative defense; Def must raise in pleading or by motion

B. Failure to raise the defense constitutes waiver

State ex rel Susedik
v Knutson
52 Wis. 2d 593, 596–98
(1971)

C. Def is equitably estopped from asserting S/L as a defense if conduct and representations were so unfair and misleading as to outbalance public interest in limitation

8. Effect of Repeal or Amendment of Statutes of Limitation

§ 990.06
§ 991.07

A. Once C/A has accrued, subsequent repeal or amendment of S/L has no effect. S/L at time of accrual of C/A governs

Gutter v Seamandel
103 Wis. 2d 1 (1981)
Snopek v
Lakeland Med Ctr
223 Wis. 2d 288 (1999)

B. Newly created or amended S/L generally applies only to C/A accruing after effective date of new statute or amendment, except when

1) Statute is procedural or remedial, and retroactive application does not disturb contracts or vested rights, or

2) Statute contains express language or reveals legislative intent that it apply retroactively

9. Claims Against Suable Governmental Entities

§ 893.80

A. No action may be brought against governmental body, officer, or employee unless claimant files

1) Notice of injury

2) Notice of claim

§ 801.02(7)(bm)

a. Note: No compliance with § 893.80 required by prisoner filing petition for common-law writ of certiorari or seeking injunctive relief if Ct finds substantial risk to prisoner's health and safety

§ 893.80(1d)(a)

B. Notice of injury

1) Time limits

a. Written notice of circumstances of claim must be given within 120 days after event giving rise to claim

Yacht Club at Sister Bay Condo Ass'n v Vill of Sister Bay
2019 WI 4, ¶¶ 2, 27, 42
385 Wis. 2d 158

b. Failure to provide notice within 120 days after event renders notice untimely

Yacht Club at Sister Bay Condo Ass'n v Vill of Sister Bay
2019 WI 4, ¶¶ 18, 27
385 Wis. 2d 158

c. Depending on nature of underlying claim, some "events" are not continuing but represent new events requiring the filing of new notice of injury (e.g., under nuisance law, each nuisance equates to a new event)

§ 893.80(1m)
§ 893.55(1m), (2), (3)
§ 893.56

d. For medical malpractice claims, notice provisions of § 893.80(1d) do not apply. Medical malpractice claims against governmental entities must be commenced within periods applicable to claims against private health-care providers

§ 893.80(1p)

e. For negligent inspection of property, time limit is 1 year after discovery of negligent act

Mannino v Davenport
99 Wis. 2d 602 (1981)

2) Purpose is to give governmental entity opportunity to investigate

§ 893.80(1d)(a)
Bostco LLC v Milwaukee Metro Sewerage Dist
2013 WI 78, ¶ 88
350 Wis. 2d 554
Clark v League of Wis Municipalities Ins Co
2021 WI App 21, ¶¶ 9, 14
397 Wis. 2d 220

3) If governmental entity has actual notice of claim and claimant, failure to give formal notice not a bar to suit if claimant shows failure is not prejudicial

E-Z Roll Off, LLC v Cty of Oneida
2011 WI 71, ¶ 49
335 Wis. 2d 720

Prejudice refers to delay that results in inability of claimants to adequately defend their case

Townsend v Neenah Jt Sch Dist
2014 WI App 117,
¶¶ 17–19
358 Wis. 2d 618
Markweise v Peck Foods
205 Wis. 2d 208
(Ct. App. 1996)

4) Requirement applies to all claimants (named and unnamed) in class action

§ 893.80(1d)(b)

C. Notice of claim

City of Racine v
Waste Facility Siting Bd
216 Wis. 2d 616 (1998)
DNR v City of Waukesha
184 Wis. 2d 178 (1994)

1) Generally applies to actions against governmental entity, including counterclaims and cross-claims (previously was construed to apply only to tort claims)

a. But does not apply to

§ 893.80(8)
St ex rel Auchinleck v
Town of LaGrange
200 Wis. 2d 585 (1996)

- Public records or open meetings request

§ 893.80(8)

- Actions under § 281.99 for administrative forfeitures for safe drinking water violations

§ 893.80(8); *see* § 14.82,
§ 601.58

- Claims against Interstate Insurance Product Regulation Comm'n

Gillen v City of Neenah
219 Wis. 2d 806 (1998)

- Claims brought pursuant to public trust doctrine under § 30.294 seeking injunctive relief

Gamroth v
Village of Jackson
215 Wis. 2d 251
(Ct. App. 1997)

- Appeal of special assessment

§ 801.02(7)(bm)

- Action by prisoner seeking injunctive relief when Ct finds there is a substantial risk to prisoner's health or safety

Felder v Casey
108 S. Ct. 2302 (1988)
Gillen v City of Neenah
219 Wis. 2d 806 (1998)

- 42 USC § 1983 actions brought in State Ct

Town of Burke v
City of Madison
225 Wis. 2d 615
(Ct. App. 1999)

- Action contesting annexation

Dixson v
Wis Health Org Ins
2000 WI 95
237 Wis. 2d 149

- Claims for contribution

Nesbitt Farms, LLC v City of Madison
2003 WI App 122
265 Wis. 2d 422

- Appeal of condemnation award

Oak Creek Citizen's Action Comm v City of Oak Creek
2007 WI App 196
304 Wis. 2d 702

- Petition to comply with direct legislation statute—§ 9.20

E-Z Roll Off, LLC v Cty of Oneida
2011 WI 71, ¶¶ 23–24
335 Wis. 2d 720
Nesbitt Farms, LLC v City of Madison
2003 WI App 122
265 Wis. 2d 422

b. Test for non-application of notice-of-claim statute requires consideration of:

- Specific statutory scheme for which plaintiff seeks exemption
- Legislative preference for prompt resolution of the type of claim under consideration
- Whether purposes for which § 893.80(1d) was enacted would be furthered by requiring notice of claim

2) Must give "itemized statement of the relief sought" (i.e., specify dollar amount)

Bostco LLC v Milwaukee Metro Sewerage Dist
2013 WI 78, ¶ 88
350 Wis. 2d 554
Thorp v Town of Lebanon
2000 WI 60
235 Wis. 2d 610
Probst v Winnebago Cty
208 Wis. 2d 280
(Ct. App. 1997)

a. Substantial compliance is sufficient

Yacht Club at Sister Bay Condo Ass'n v Vill of Sister Bay
2019 WI 4, ¶¶ 20, 32, 37
385 Wis. 2d 158

3) Purpose is to give governmental entity opportunity to compromise claim before suit and to budget for settlement/litigation

4) No statutory time for presentation of notice of claim if presented separate from notice of injury

§ 893.80(1p)
Townsend v
Neenah Jt Sch Dist
2014 WI App 117,
¶¶ 20, 22
358 Wis. 2d 618

5) Substantial compliance with statute all that is required. Class actions must name individual claimants. Unnamed individuals of a class statutorily unacceptable

§ 893.80(1g)

6) Must commence action within 6 months after disallowance of claim, or be barred

a. Failure of governmental body to disallow within 120 days after presentation is a disallowance

b. May not commence action before disallowance

D. Disallowance of claim is prerequisite to commencement of action

§ 893.80(1g)

1) Formal disallowance: If formal "notice of disallowance" served on plaintiff, action must be commenced within 6 months after service of notice or be barred

Pool v City of Sheboygan
2007 WI 38
300 Wis. 2d 74

a. Notice must be served on claimant in strict compliance with statute

Griffin v
Milwaukee Transp Servs
2001 WI App 125
246 Wis. 2d 433

b. This shortened S/L, when formal disallowance filed, is constitutional and does not violate equal protection

2) Failure to disallow: Failure of governmental body to disallow within 120 days after presentation of claim is disallowance

Colby v Columbia Cty
202 Wis. 2d 342 (1996)

a. Filing of complaint before disallowance period has run is not "commencement of action" and does not toll S/L

b. But 120-day disallowance period effectively extends S/L by 120 days (e.g., tort personal-injury S/L becomes 3 years and 120 days)

St v Town of Linn
205 Wis. 2d 426
(Ct. App. 1996)

3) Constructive disallowance: Actions of municipality may constitute constructive disallowance, permitting filing of suit before 120 days

Weiss v
City of Milwaukee
79 Wis. 2d 213 (1977)

E. Pleading compliance

1) Plaintiff need not allege notice and claim in complaint

Maple Grove Country
Club Inc v Maple Grove
Ests Sanitary Dist
2019 WI 43, ¶ 56
386 Wis. 2d 425

2) But Def must plead noncompliance or defense waived

Failure to plead noncompliance with § 893.80(1d) as an affirmative defense constitutes waiver

Thorp v Town of Lebanon
2000 WI 60
235 Wis. 2d 610

3) But Def must plead noncompliance or defense waived

10. Claims Against State Employees

§ 893.82(1)(a), (b)

A. Purpose of notice provisions

1) Provide AG with adequate time to investigate claims

2) Provide AG with opportunity to effect compromise before suit

§ 893.82(3)

B. Notice of claim of injury is prerequisite to bringing suit

§ 893.82(2m)
Modica v Verhulst
195 Wis. 2d 633
(Ct. App. 1995)

1) Strict compliance with statute required

Lamoreux v Oreck
2004 WI App 160
275 Wis. 2d 801

No exception to notice requirement for mistaken belief regarding Def's status as state employee

§ 893.82(3), (5)

2) Must be served on AG within 120 days after event causing injury

Notice must be served upon AG at office in the Capitol, or at the Department of Justice, by personal service or by certified mail

§ 893.82(5m)
§ 893.55(1m), (2), (3)
§ 893.56

3) But for medical malpractice claims, notice provisions of § 893.82(3) do not apply. Medical malpractice claims against governmental entities must be commenced within periods applicable to claims against private health-care providers

Carlson v Pepin Cty
167 Wis. 2d 345
(Ct. App. 1992)

4) Unlike § 893.80, actual notice and lack of prejudice are not exceptions to 120-day notice requirement

5) Sec. 893.82 does not differentiate between notice of injury and notice of claim (as in § 893.80)

Felder v Casey
108 S. Ct. 2302 (1988)

6) Note: Requirement does not apply to

a. Actions under 42 USC § 1983

Casteel v McCaughtry
176 Wis. 2d 571 (1993)

b. Claims for declaratory and injunctive relief

§ 893.82(5)

C. Requirements of notice

Est of Hopgood v Boyd
2013 WI 1, ¶ 53
345 Wis. 2d 65

1) Must be sworn to by claimants

a. Notice of claim must contain statement showing oath occurred

b. Notary should set forth in jurat that oath was taken before notary

§ 893.82(3)

2) Must state time, date, location, circumstances, and persons involved

Modica v Verhulst
195 Wis. 2d 633
(Ct. App. 1995)
Protic v Castle Co
132 Wis. 2d 364
(Ct. App. 1986)

3) Must include name of state employee

D. Disallowance of claim

§ 893.82(3)

1) Specific denial by AG not generally a condition precedent to bringing action

§ 893.82(3m)

2) But, if claimant is a prisoner, may not commence action until AG denies claim or until 120 days after notice of claim, whichever is earlier

11. Common Statutes of Limitation

South Milwaukee Sav Bank v Barrett
2000 WI 48
234 Wis. 2d 733, *aff'g*
229 Wis. 2d 521
(Ct. App. 1999)

A. Unless legislature clearly requires application of a specific S/L, case law requires application of 6-year S/L

B. Action on judgment

§ 893.40

1) If Ct of record—20 years

§ 893.42

2) If Ct not of record—6 years

§ 893.425

C. Voidable transfers

§§ 893.425(1), (2), 242.04
Official Comm v Theisen
2018 WI App 70, ¶ 38
384 Wis. 2d 580

1) Generally, not later than 4 years after transfer made or obligation incurred, but may be extended to 1 year after the transfer or obligation is or could reasonably have been discovered

§ 893.425(3)
§ 242.05(2)

2) Not later than 1 year after transfer if debtor insolvent and transfer made to insider, who knew of insolvency, for antecedent debt

§ 893.43
§ 402.725(1)

D. Contract (including UCC)—6 years

§ 893.33(2), (5)
Bank of NY Mellon v Klomsten
2018 WI App 25, ¶¶ 13–17, 381 Wis. 2d 218

1) Contract S/L not applicable to mortgage foreclosure

2) See **Sec. 3.C.2**) (Accrual of contract C/A), *supra*, re: UIM and UM claims

§ 893.44

E. Compensation for personal services, except professional services—2 years

§ 893.51(1)

F. Conversion—6 years

§ 893.51(2)
§ 134.90

G. Trade secrets—3 years after discovery of misappropriation

§ 893.52

H. Injury to property (except injury from motor vehicle)—6 years

§ 893.54

I. Injury to property from motor vehicle—3 years

§ 893.53

J. Injury to character or other rights—3 years

§ 893.54(1m)(a)

K. Personal injury—3 years

§ 893.54(1m)(b)

L. Wrongful death (except from motor vehicle)—3 years

§ 893.54(2m)

1) Wrongful death from motor vehicle—2 years

Est of Genrich
v OHIC Ins Co
2009 WI 67
318 Wis. 2d 553

2) But for wrongful death arising from medical negligence, S/L is 3 years from date of injury (not death) caused by underlying act of medical negligence

§ 893.55(1m)
John Doe 56 v Mayo
Clinic Health Sys—Eau
Claire Clinic, Inc
2016 WI 48
369 Wis. 2d 351

M.

Medical malpractice

1) 3 years from date of injury, or

2) 1 year from date of discovery, but not more than 5 years from date of act or omission

§ 893.555(2)

N. Long-term care provider

1) 3 years from date of injury, or

2) 1 year from date injury was discovered or, in exercise of reasonable diligence should have been discovered, but not more than 5 years after date of act or omission

§ 893.57

O. Intentional torts—3 years. Includes

See 2009 Wis Act 120

NOTE: For injuries occurring before February 26, 2010, a 2-year S/L applied.

1) Libel/slander

2) Assault/battery

3) Invasion of privacy

4) False imprisonment

Zastrow v Journal Commc'ns, Inc 2006 WI 72 291 Wis. 2d 426

5) Breach of fiduciary duty of loyalty

Turner v Sanoski 2010 WI App 92 327 Wis. 2d 503

6) Malicious prosecution

Munger v Seehafer 2016 WI App 89 372 Wis. 2d 749

7) Intentional trespass

§ 893.58

P. Seduction—1 year

§ 893.585

Q. Sexual exploitation by therapist—3 years

But time is tolled if plaintiff unable to bring action because of effects of sexual contact, not to exceed 15 years

§ 893.587

R. Sexual assault of child—before victim reaches age of 35 years

Fleming v Amateur Athletic Union of US, Inc, 2023 WI 40, ¶¶ 3, 36, 407 Wis. 2d 273

Extended limitation period does not apply to claims for negligent hiring, training, or supervision brought against the employer of a child sex assaulter

§ 893.66

S. Actions against accountants for professional services—6 years

§ 452.142 (eff 3/4/2016)

T. Actions against real estate broker or real estate firm—2 years

§ 893.895

U. Actions against real estate appraisers—5 years

§ 893.70

V. Actions against sheriff, coroner, medical examiner, town clerk, or constable for acts in official capacity—3 years

§ 893.72

W. Special assessments—1 year from notice of assessment

§ 893.93(1)(b)

X. Fraud—3 years

§ 893.93(3)(b)

Y. Action under Ch 135 (Fair Dealership Act)—1 year

§ 893.89(1)

Z. Injury resulting from improvements to real property—7 years after date of substantial completion of improvement

AA. For writs and administrative proceedings, see specific chapters (Certiorari, Worker's Compensation, Ch 227)

§ 100.18(11)(b)3.

BB. False Advertising—3 years after unlawful act or practice

§ 893.93(2)
St ex rel Leung v
City of Lake Geneva
2003 WI App 129
265 Wis. 2d 674

CC. Actions claiming violation of open meetings law—2 years

Segall v Hurwitz
114 Wis. 2d 471
(Ct. App. 1983)

DD. Conspiracy—S/L of tort committed in furtherance of conspiracy

§ 103.10(13)(b)
§ 227.53(1)(a)2.
Hoague v
Kraft Foods Global, Inc
2012 WI App 130, ¶ 7
344 Wis. 2d 749

EE. Wis Family or Medical Leave Act 60-day limitation period runs consecutively to the 30-day period for seeking judicial review

§ 66.0217(11)(a)
§ 893.73(2)(b)
Town of Burnside v
City of Independence
2016 WI App 94
372 Wis. 2d 802

FF. Annexation—90-day limitation from legislative approval of ordinance to annex

CV 8: DISCOVERY

1. Purpose of Discovery

St ex rel Dudek v Cir Ct
34 Wis. 2d 559 (1967)

A. To define and narrow issues

B. Opportunity to find facts and evidence for trial

§ 804.01(2)(a)

C. Discovery must be proportional to the needs of the case, considering the following:

1) Importance of issues at stake in the action

2) Amount in controversy

3) Parties' relative access to relevant information

4) Parties' resources

5) Importance of discovery in resolving the issues

6) Whether the burden or expense of the proposed discovery outweighs its likely benefit

2. Methods of Discovery

§ 804.05

A. Deposition upon oral exam

1) Requires reasonable written notice

2) Subpoena used, if needed

§ 804.05(8)
§ 804.03(4)

3) May be conducted by telephone or by audio-visual equipment

§ 804.06

B. Deposition upon written questions

1) Service of reasonable written notice and written questions

2) Subpoena used, if needed

§ 804.08

C. Written interrogatories

Served on party without leave of Ct

§ 804.09

D. Production of documents, electronically stored information, or other tangible evidence

1) Request served on party without leave of Ct (except in case of prisoners. *See* **CV 45**)

2) Independent action necessary for production by non-party

§ 804.09

E. View of property or other evidence

1) Request served on party without leave of Ct (except in case of prisoners. *See* **CV 45**)

2) Independent action needed for non-party

3) Request must meet four criteria:

a. Reasonably describe items to be inspected

b. Specify reasonable time, place, and manner of inspection

c. Unless otherwise ordered or stipulated, limited to reasonable time period not more than 5 years before accrual of cause of action. This limitation does not apply to requests for:

- Patient health-care records
- Vocational records
- Educational records
- Similar records

d. Request may specify forms in which electronically stored information is to be produced

§ 804.10

F. Physical, mental, and vocational examinations

1) Order on motion for cause shown

2) Notice to parties concerning specifics of examination

§ 804.11

G. Requests for admission

1) Served without leave of Ct (except in case of prisoners. *See* **CV 45**)

§ 804.11(1)(a)
Schmid v Olsen
111 Wis. 2d 228, 236
(1983)

2) May encompass any issue of law or fact within scope of § 804.01(2), including ultimate issues for trial

§ 804.11(2)
Luckett v. Bodner
2009 WI 68
318 Wis. 2d 423
Mucek v Nationwide
Commc'ns Inc
2002 WI App 60
252 Wis. 2d 426

3) Ct may permit withdrawal or amendment of admission if statutory conditions of § 804.11(2) are met, but Ct not required to do so

Rivera v Perez
2010 WI App 91
327 Wis. 2d 467

a. Ct may consider admitting party's history of discovery abuse when determining prejudice and when exercising Ct's authority to control orderly and prompt case processing

§ 805.07(2)(b)

H. Third-party subpoena

1) 10-day notice to all parties

2) If duces tecum, no documents may be provided before date and time specified

3. Jurisdiction over Nonresidents: Oral Depositions

§ 804.05(3)

A. Nonresident plaintiff

1) On reasonable written notice

2) Examination

a. In Wis Cty where action located, or

b. Within 100 miles of

- Residence
- Place of employment
- Place where plaintiff transacts business in person

c. In place fixed by Ct

3) At plaintiff's expense

§ 804.05(3)(b)3.

B. Nonresident Def

1) By subpoena in Wis

2) Examination within 100 miles from place Def served

§ 804.05(3)(b)4.

C. Nonresident non-party

1) By subpoena in Wis

2) Examination

a. Within 100 miles of

- Residence
- Place of employment
- Place party transacts business in person
- Place served

b. In convenient place fixed by Ct

4. Protective Orders

§ 804.01(1)

A. Use of discovery is unlimited in scope without protective order or local Ct rule, except

§ 804.15

1) Prisoners. See **CV 45**

§ 804.01(2)(am)

2) Ct shall limit the frequency or extent of discovery if:

a. Discovery sought is cumulative or can be obtained more easily from another source; or

b. Burden or expense of discovery outweighs likely benefit or it is not proportional to the case, considering:

- Needs of the case
- Amount in controversy
- Parties' resources
- Complexity and importance of issues at stake
- Importance of discovery in resolving issues

3) Unless otherwise stipulated or ordered, a party is limited to:

§ 804.045

a. 10 depositions, none exceeding 7 hours

§ 804.08(1)(am)

b. 25 interrogatories, including all subparts

§ 804.01(4)

B. Methods of discovery may be used in any sequence

§ 804.01(3)

C. Protective order may be sought by any party or person from whom discovery is sought

1) Requirements

a. Motion must be made and good cause shown

b. Must be for convenience of witnesses or parties, and

c. Must be in interests of justice

d. May be heard by telephone under § 807.13

§ 804.01(3)

2) Order protects party or person from

a. Annoyance

b. Embarrassment

c. Oppression

d. Undue burden or expense

St v
Beloit Concrete Stone Co
103 Wis. 2d 506
(Ct. App. 1981)

3) Issuance of order is discretionary

§ 804.01(2)(e)1g.d.

4) In response to motion for protective order regarding electronically stored information, producing party must show that the information is not reasonably accessible because of undue burden or cost. If shown, Ct may order discovery from such sources only if requesting party shows good cause, considering limitations of § 804.01(2)(am)

St ex rel Dudek v Cir Ct
34 Wis. 2d 559, 599
(1967)

D. Important considerations

1) Particular facts and issues of case

2) Need for mutual discovery

3) Overall fairness to parties and experts

Konle v Page
205 Wis. 2d 389
(Ct. App. 1996)

4) Privacy interests

§ 804.01(3)(a)

E. Order may include (without limitation)

1) That discovery not be had

2) That discovery may be had only by specifying terms, including time and place or allocation of expenses for disclosure or discovery

3) That discovery may be had only by method of discovery other than that selected by party seeking discovery

4) That certain matters not be inquired into or that scope of discovery be limited to certain matters

5) That discovery be conducted with no one present except persons designated by Ct

6) That deposition after being sealed, be opened only by Ct order

7) That trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in designated way

8) That parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by Ct

5. Limits on Discovery

A. Privileges and immunity

Ch 905

1) Ct cannot order discovery of Ch 905 privileged material

§ 905.03

a. Lawyer-client

St v Hydrite Chem Co
220 Wis. 2d 51
(Ct. App. 1998)

- Privilege waived when privilege holder attempts to prove claim or defense at issue by disclosing or describing an Atty-client communication

Harold Sampson
Children's Tr v
Linda Gale Sampson
1979 Tr
2004 WI 57
271 Wis. 2d 610
Lane v
Sharp Pkg Sys, Inc
2002 WI 28
251 Wis. 2d 68

- Lawyer-client privilege belongs to client, and only client can waive

- If billing records reveal the substance of lawyer-client communications, they are privileged

§ 905.04
Steinberg v Jensen
194 Wis. 2d 439 (1995)

b. Patient and physician, psychologist, registered nurse, chiropractor, social worker, marriage and family therapist, podiatrist, naturopathic doctor, and professional counselor

St ex rel Pflaum v
Wis Psych Exam'g Bd
111 Wis. 2d 643, 645
(Ct. App. 1983)

- "Patient" does not include person who submits to examination for scientific purposes

Crawford v
Care Concepts, Inc
2001 WI 45
243 Wis. 2d 119

- Information concerning assaultive or disruptive behavior contained in medical records is not confidential and not privileged

§ 905.05

c. Husband-wife and domestic partner

§ 905.06

d. Communications to clergy

§ 905.065

e. Communication during or result of examination using an honesty testing device

§ 905.07

f. Political vote

§ 905.08

g. Trade secrets

§ 905.09

h. Law enforcement records

§ 905.10

i. Identity of informers

§ 905.045

j. Communication between victim of domestic abuse or sexual assault and an advocate for such victims

§ 885.205

2) Privileged communications between a college dean and a student, including advice given

a. In course of counseling student, or

b. During investigation of conduct of student

§ 885.205

3) Privileged communications between any school psychologist and student, including advice given

a. In course of counseling student, or

b. During investigation of conduct of student

4) Legislative immunity

Wis Const art IV, § 15

a. Protects legislator 15 days before, during, and 15 days after legislative session

St v Beno
110 Wis. 2d 40
(Ct. App. 1982)
rev'd in part
116 Wis. 2d 122 (1984)

b. Does not protect legislative aides

St v Beno
116 Wis. 2d 122 (1984)

- But see discussion of Wis Const art IV, § 16, in Supreme Ct decision

§ 19.85
Sands v
Whitnall Sch Dist
2008 WI 89
312 Wis. 2d 1

5) Open Meetings Law

a. Open meetings laws do not create evidentiary privilege that exempts public body from discovery compliance in litigation

b. Ct may consider objections to discovery under § 804.01(2)(a) and may make appropriate protective order under § 804.01(3)

Wis Const art I, § 3
St ex rel Green Bay
Newspaper Co v Cir Ct
113 Wis. 2d 411 (1983)
Kurzynski v Spaeth
196 Wis. 2d 182
(Ct. App. 1995)

6) Journalistic privilege

a. Balancing test

b. Qualified privilege

Farmers Auto Ins Ass'n
v Union Pac Ry
2008 WI App 116, ¶ 19

313 Wis. 2d 93, *aff'd*,
2009 WI 73
319 Wis. 2d 52

7) Contractual arbitration/appraisal process

Absent prima facie showing of species of fraud, party cannot seek discovery from contractual arbitrators/ appraisers

§ 804.01(2)(c)
St ex rel Dudek v Cir Ct
34 Wis. 2d 559, 589
(1967)

B. Atty work product

1) Definition

§ 804.01(2)(c)1.

a. Information Atty has assembled, mental impressions, legal theories, and strategies

b. Derived from interviews, statements, memoranda, correspondence, briefs, legal and factual research, mental impressions, personal beliefs, and other tangible and intangible means

Lane v
Sharp Pkg Sys, Inc
2002 WI 28
251 Wis. 2d 68

c. Document must be prepared or obtained because of prospect of litigation

§ 804.01(2)(c)1.

2) Work product enjoys a qualified privilege

a. Party seeking discovery must show good cause for discovery, including

- Substantial need for the materials
- That party is unable, without undue hardship, to obtain substantial equivalent by other means
- Denial of discovery will prejudice movant's preparation for trial

St ex rel Dudek v Cir Ct
34 Wis. 2d 559, 592
(1967)

b. Good cause depends on

- Reason certain item is classified as work product, and
- Reason advanced for demanding discovery

3) Specific materials

a. Statement made by party to own Atty

§ 905.03

- Absolute protection by Atty-client privilege

§ 804.01(2)(c)2.

b. Statement by party to opposing Atty

- Minimal showing of good cause requires production

c. Statements by non-party witness taken by Atty

- Discovery generally not allowed if witness available to party seeking discovery
- Discovery may be permitted, provided diligent search for witness was made and witness is dead, hostile, out of jurisdiction, or whereabouts unknown
- Ct may consider economic hardship for impecunious party and prejudice to preparation for trial

d. Statements from witnesses taken by non-lawyers

- Less strong showing of cause necessary for production

e. Names of witnesses

- Good policy to require discovery

f. Names of non-witness, non-expert investigators

- No discovery without showing of good cause
- Not “relevant to controversy”

g. Non-witness, expert consultants

St ex rel Shelby Mut Ins Co v Cir Ct
67 Wis. 2d 469 (1975)

Halldin v Peterson
39 Wis. 2d 668 (1968)

- Special need or hardship must be shown

§ 804.01(2)(d)
St ex rel Dudek v Cir Ct
34 Wis. 2d 559 (1967)

h. Testimonial experts—discovery permitted in Ct's discretion, based on following factors

- Particular facts and issues of case
- Relative positions of the parties
- Necessity of mutual discovery
- Overall fairness to parties
- Overall fairness to experts themselves

i. Routine reports to employer or insurer

Shibilski v
St Joseph's Hosp
83 Wis. 2d 459, 469
(1978)

- Not protected work product, even though contained in Atty's files

Ranft v Lyons
163 Wis. 2d 282
(Ct. App. 1991)

j. Video surveillance tapes—unless offered for use at trial, when Trial Ct required to give opposing party ample opportunity to challenge admissibility of materials outside jury's presence (see **CV 15**, this volume, **Sec. 4**, **Demonstrative Evidence and Experiments**)

§ 904.085

C. Communications in mediation

§ 904.085(3)(a)

No oral or written communication relating to a dispute in mediation is subject to discovery

§ 804.01(2)(e)

D. No discovery of electronically stored information may be had under § 804.09 or § 804.08(3) until parties confer (unless excused by Ct) regarding:

1) Subjects on which discovery of electronically stored information may be needed

2) Preservation

3) Form of production

4) Claims of privilege

5) Costs

6) Appointment of referee

§ 804.01(2)(e)1g.

E. A party is not required to provide any of these categories of electronically stored information without the moving party showing substantial need and good cause, subject to a proportionality assessment:

1) Data that cannot be retrieved without substantial additional programming or without transforming it into another form before search and retrieval can be achieved

2) Backup data substantially duplicative of data more accessible elsewhere

3) Legacy data from obsolete systems that are unintelligible on successor systems

4) Any other data not available to producing party in ordinary course of business and that the party identifies as not reasonably accessible because of undue burden or cost

6. Discovery of Specific Items

A. Medical records of party

1) Ct order needed

§ 804.10(2)
Ambrose v
General Cas Co
156 Wis. 2d 306
(Ct. App. 1990)

2) Ct shall order x-ray and right to inspect and copy any hospital, medical, or other records and reports within scope of § 804.01(2)

§ 804.01(2)(b)

B. Insurance agreements

§ 804.01(2)(bg)

C. Third-party agreements

§ 804.01(2)(c)2.

D. Party's own statement

Upon request without showing of good cause

§ 804.01(2)(c)2.

E. Non-party's own statement concerning action

1) Upon request without showing of good cause

2) If request denied, may move for Ct order

§ 804.08(2)(b)

F. Contentions or opinions

Ct can delay answer until after designated discovery or pretrial conference

§ 804.08(3)

G. Business records

§ 804.01(2)(d)

7. Discovery of Experts

A. Discovery of facts and opinions of experts otherwise discoverable under § 804.01(2)(a) and acquired or developed in anticipation of litigation, may be obtained only if

1) Expert expected to be called as witness

a. Party seeking discovery of the expert requires any other party to identify such expert through written interrogatories

§ 804.01(2)(d)1.

b. Party may depose any expert identified for trial

§ 804.01(2)(d)2.

2) Expert not expected to be called as witness

a. A party may through interrogatories or deposition obtain discovery of expert but only upon a showing of exceptional circumstances that make it impractical to obtain information by other means

3) Payment of fees and expenses pursuant to § 804.01(2)(d)3. *See infra* **Sec. 8**

Lassa v Rongstad
2006 WI 105, ¶ 75
294 Wis. 2d 187
Carney-Hayes v
NW Wis Home Care, Inc
2005 WI 118
284 Wis. 2d 56
Glenn v Plante
2004 WI 24

269 Wis. 2d 575
Burnett v Alt
(In re Imposition of
Sanctions in Alt v Cline)
224 Wis. 2d 72 (1999)

B. Expert opinions are afforded a qualified privilege and, when asserted, expert cannot be compelled to give expert opinion testimony, UNLESS:

1) Discovering party shows compelling need,

NOTE: Discovery of expert's factual observations is available, however, without a showing of compelling need.

2) Plan for reasonable compensation is presented, AND

3) Expert will not be required to do additional preparation

Carney-Hayes v
NW Wis Home Care, Inc
2005 WI 118, ¶ 61
284 Wis. 2d 56

C. Medical experts

1) Must testify about own conduct relevant to case

2) Unless compelling need shown, expert cannot be forced to give opinion of standard of care or treatment provided by another person

3) Medical witness may be required to give opinion about standard of care governing own conduct if alleged to cause injury

8. Experts' Fees and Expenses

§ 804.01(2)(d)3.

A. Experts' time

Party seeking discovery must pay expert witness or nontestimonial expert hired in anticipation of litigation for time spent in responding to discovery of facts or opinions held by them

§ 804.01(2)(d)3.

B. Expenses incurred for expert witnesses

Ct may order party seeking discovery to pay other party a fair portion of fees and expenses incurred by latter in obtaining facts and opinions from expert witnesses

§ 804.01(2)(d)3.

C. Expenses incurred for nontestimonial experts

Ct must order party seeking discovery to pay other party a fair portion of fees and expenses incurred by latter in obtaining facts and opinions from nontestimonial expert

9. Failure to Make Discovery

§ 804.12(1)

A. Party, on reasonable notice, may apply for order compelling discovery if party from whom discovery is sought refuses to permit or provide full discovery

§ 804.12(5)

1) Motion may be heard by telephone as prescribed in § 807.13

§ 804.01(2)(e)1g.d.

2) In response to motion to compel discovery, producing party must show that information is not reasonably accessible because of undue burden or cost. If shown, Ct may order discovery from such sources only if requesting party shows good cause, considering limitations of § 804.01(2)(am)

B. Expenses of motion to compel discovery

§ 804.12(1)(c)1.

1) Motion granted

a. Party, deponent, Atty, or all whose conduct or advice necessitated motion must pay

- Includes Atty fees

b. Opportunity for hearing

c. Defenses

- Opposition substantially justified
- Other circumstances make unjust

§ 804.12(1)(c)2.

2) Motion denied

a. Moving party, Atty, or both must pay

- Includes Atty fees

b. Opportunity for hearing

c. Defenses

- Motion substantially justified
- Other circumstances make unjust

§ 804.12(1)(c)3.

3) Motion partly granted

a. Ct has discretion in apportioning expenses

10. Spoliation of Evidence and Destruction of Documents

Am Fam Mut
Ins Co v Golke
2009 WI 81, ¶ 28
319 Wis. 2d 397

A. Elements of duty to preserve evidence relevant to a potential legal claim

1) If legitimate reason to destroy exists, party or potential litigant may destroy relevant evidence (without violating duty to preserve) only if:

a. Reasonable notice of possible claim is given

b. Basis for claim is provided

c. Notice of existence of evidence relevant to claim is given

d. Reasonable opportunity to inspect evidence is given

B. Sanctions for violation of duty to preserve

Mueller v Bull's Eye
Sport Shop, LLC
2021 WI App 34
398 Wis. 2d 329
Garfoot v
Fireman's Fund Ins Co
228 Wis. 2d 707
(Ct. App. 1999)

1) Dismissal or default judgment only when egregious conduct exists, that is, conscious attempt to affect litigation outcome or flagrant, knowing disregard of judicial process

a. If above finding made, prejudice need not result for dismissal to be ordered

Milw Constructors II
v MMSD
177 Wis. 2d 523
(Ct. App. 1993)

2) In determining whether a sanction should be imposed for destruction of documents, consider five factors

a. Identification, with as much specificity as possible, of destroyed documents

b. Relationship of destroyed documents to issues in present action

c. Extent to which such documents can now be obtained from other sources

Ins Co of N Am
v Cease Elec Inc
2004 WI App 15
269 Wis. 2d 286
aff'd on other grounds
2004 WI 139
276 Wis. 2d 361

d. Whether party destroying documents knew or should have known at time of destruction that litigation against opposing party was a distinct possibility, and

e. Whether, in light of circumstances disclosed by factual inquiry, sanctions should be imposed on party responsible for destruction and, if so, what the sanctions should be

§ 804.12(4m)

3) Ct may not sanction for failure to provide electronically stored information lost as result of routine, good-faith operation of electronic information system, absent exceptional circumstances

§ 804.12(2)

11. Discovery Sanctions

Odegard v Birkeland
(In re Est of Glass)
85 Wis. 2d 126 (1978)

A. Ct may make any of following orders, among others, for failure to permit discovery

1) Designate matters to be taken as established for purposes of the claim of party obtaining the order

2) Refuse to allow disobedient party to support or oppose designated claims or defenses

3) Prohibit disobedient party from introducing designated matters into evidence

4) Strike out pleadings or parts of them

5) Stay further proceedings until discovery order obeyed

6) Grant default judgment or dismiss action or proceeding or any part of action or proceeding

Mohns Inc v. BMO Harris Bank, NA
2021 WI 8, ¶¶ 36, 39
395 Wis. 2d 421

a. Requires finding of egregious conduct or bad faith without clear and justifiable excuse

Mohns Inc v. BMO Harris Bank, NA
2021 WI 8, ¶ 39
395 Wis. 2d 421

- Unintentional conduct that is extreme, substantial, and persistent fits definition of egregiousness

Mohns Inc v. BMO Harris Bank, NA
2021 WI 8, ¶ 37
395 Wis. 2d 421

- Prejudice to party not required to be shown

Halko v Halko
2005 WI App 99, ¶ 14
281 Wis. 2d 825

b. Dismissal is appropriate only in extraordinary circumstances

Industrial Roofing Servs, Inc v Marquardt
2007 WI 19, ¶ 61
299 Wis. 2d 81

c. Erroneous exercise of discretion to impose sanction of dismissal with prejudice when client is blameless

7) In lieu of any of foregoing orders or in addition to them, treat failure to obey any orders as contempt of Ct

Except order to submit to physical or mental examination

Hur v Holler
206 Wis. 2d 335
(Ct. App. 1996)

8) In lieu of any of the foregoing orders or in addition to them, Ct shall require party failing to obey order, Atty advising party, or both to pay reasonable expenses, including Atty fees as well as non-compensatory monetary damages, caused by failure, unless

a. Ct finds failure was substantially justified

b. Other circumstances make award of expenses unjust

Chevron Chem Co v Deloitte & Touche
176 Wis. 2d 935 (1993)

9) Grant judgment after trial

See **CV 20**, **Motions After Verdict**

§ 804.12(3)

B. Failure to admit

1) Ct may order party failing to admit to pay reasonable expenses incurred by requesting party if requesting party proves truth of the matter

Michael AP v Solsrud
178 Wis. 2d 137
(Ct. App. 1993)

Includes Atty fees

§ 804.12(3)

2) Order shall issue, unless

a. Request held objectionable under § 804.12(1)

b. Admission was unimportant

c. Party reasonably believed he or she might prevail, or

d. Any other good reason

§ 804.12(5)

3) Motion may be heard by telephone as prescribed in § 807.13

§ 804.12(4)

C. Other failures

1) Ct may penalize party for

a. Failure to appear before officer who is to take party's deposition, after proper notice

b. Failure to serve answers or objections to interrogatories, after proper service

c. Failure to serve written response to request for inspection, after proper service

d. Failure to seasonably supplement or amend response when obligated

§ 804.12(4)

2) Ct may make following sanctions, among others

a. Establish facts for purposes of the action in accordance with claim of party obtaining order

b. Refuse to allow disobedient party to support or oppose designated claims or defenses

c. Prohibit disobedient party from introducing designated matters in evidence

d. Strike out pleadings or parts of them

e. Stay further proceedings until discovery order is obeyed

Industrial Roofing Servs, Inc v Marquardt
2007 WI 19
299 Wis. 2d 81

f. Dismiss action or proceeding or any part of action or proceeding

- Must find conduct egregious
- Must find prejudice

Halko v Halko
2005 WI App 99, ¶ 14
281 Wis. 2d 825

- Only appropriate in extraordinary circumstances

Industrial Roofing Servs, Inc v Marquardt
2007 WI 19, ¶ 61
299 Wis. 2d 81

- Erroneous exercise of discretion to impose sanction of dismissal with prejudice when client is blameless

g. Render default judgment against disobedient party

§ 804.12(4)

3) In lieu of order, or in addition, Ct must require party failing to act, party's Atty, or both, to pay reasonable expenses, including Atty fees, unless

a. Failure was substantially justified

b. Other circumstances make it unjust

§ 804.12(4)

4) Failure to act is inexcusable, even if discovery sought is objectionable, unless party failing to act has applied for protective order

§ 804.12(5)

5) Motion may be heard by telephone as prescribed in § 807.13

12. Retention of Discovery Documents

§ 804.01(6)

A. Original copies of documents retained by initiating party or party's Atty

B. Original copy of deposition, sealed as received from testimony recorder, retained by Atty

1) Until appeal period has expired, or

2) Until deposition made part of record

C. Ct may direct otherwise

CV 9: CIVIL PROCEEDINGS: PHONE; VIDEO; FAX; AND E-FILING

1. Proceedings by Telephone

§ 807.13

A. General rule

§ 807.13(1)

1) Any oral argument

§ 807.13(2)

2) Oral testimony at evidentiary hearings when

a. Statutes or rules permit

b. Parties stipulate

c. Good cause shown; considerations include

- No undue surprise or prejudice
- Inability to procure physical presence after due diligence
- Convenience and cost
- Full, effective cross-exam guaranteed
- Importance of testimony in open Ct

— Observe demeanor

— Preserve solemnity of occasion

- Sufficient quality of communication
- Whether physical liberty interest is at stake
- Any other relevant factors

§ 807.13(3)

3) Conferences if statutes permit

§ 807.13(4)

B. Basic procedure

1) If on the record, Ct reporter must be in simultaneous voice communication with all parties

2) Prior notice to parties entitled to be heard

3) Regardless of location of any party, any waiver, stipulation, motion, objection, decision, order, or other action has same effect as if made in open Ct

Exception to rule that motions must be heard in circuit where action is to be tried

4) Telephonic hearing to be in courtroom or other place reasonably accessible to public, EXCEPT

a. Scheduling conferences

b. Pretrial conferences

C. Specific statutory reference to motions

1) Motions re: commencement of actions, venue, and parties

§ 801.53

a. Change of venue

§ 801.59

b. Assignment of Judge

§ 801.63

c. Stay for trial in foreign forum

§ 803.05(3)

d. Third-party practice

§ 803.06(1)

e. Misjoinder and nonjoinder

2) Motions re: discovery

§ 804.01(3)(c)

a. Protective orders

b. Refusal to answer deposition question

§ 804.05(4)(b)

- Immediate objection may be heard by telephone with consent of Judge

§ 804.05(8)

c. Participation in deposition by telephone

§ 804.12(5)

d. Sanctions hearing

3) Motions re: pretrial proceedings

§ 802.06(9)

a. Defenses; judgment on the pleadings

§ 802.08(7)

b. Summary judgment

§ 802.10(3)

c. Scheduling conference or scheduling information obtained by telephone

§ 802.10(6)

d. Pretrial conference

4) Motions re: trials

§ 805.05(1)(b)

a. Consolidation

§ 805.07(6)

b. Quash or modify subpoena

§ 805.14(5)(f)

c. Motions after verdict

§ 805.15(1)

d. New trial

§ 814.10(4)

e. Objection to taxation of costs

5) Miscellaneous motions

§ 807.05

a. Stipulations

§ 807.14

b. Interpreters

c. TROs and temporary injunctions

§ 813.02(1)(b)

- Ct may attempt to reach party to be restrained or counsel by telephone

D. For telephone use in specific civil proceedings, see

Ch 51

1) Mental Health Act

Ch 54

2) Guardians and Wards

Ch 55

3) Protective Services

Ch 799

4) Small Claims

Ch 822

5) Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)

2. Proceedings by Videoconferencing

A. General rule

§ 885.58(1)

1) Videoconferencing can be used for any pretrial, trial, or posttrial proceeding if

§ 885.54(1)(a)

a. Participants can see, hear, and communicate with each other

§ 885.54(1)(b), (c)

b. Participants can see, hear, and observe evidence, exhibits, demeanor, and nonverbal communications of other participants, and "what is taking place in the courtroom" as well as if they were present

§ 885.54(1)(d)

c. Cameras can scan entire courtroom upon request during proceeding

§ 885.54(1)(e), (g)

d. Atty for respondent/Def in Ch 48, 51, 55, 938, and 980 proceedings may appear at remote location with client and have ability to mute microphone for confidential communication. If not at remote location, Atty must have separate, private line to converse with client

§ 885.54(1)(f)

e. Means exist for transmitting documents to remote location

§ 885.54(1)(h)

f. Proceedings where Judge is presiding must be visible and audible to jury and public

B. Procedure

§ 885.58(1)

1) Ct or party may move for videoconferencing

§ 885.58(2)(a)

a. Party's notice of intention to present witness by videoconference due 30 days before proceeding

b. Opposing party has 10 days to object

c. Time may be shortened by Ct

§ 885.58(2)(b)

2) If objection, Ct exercises discretion, considering

§ 885.56(1)(a)–(L)

a. Any undue surprise or prejudice

b. Diligence of proponent in securing witness's physical attendance

c. Convenience and cost vs. relative importance of testimony

d. Ability for full cross-examination, especially with exhibits

e. Importance of witness's presence to impress duty to tell the truth

f. Whether physical liberty or fundamental right at stake

g. Sufficient Ct control over remote location

h. Whether negative distortion of witness caused by remote appearance

i. Whether videoconferencing detracts from dignity, solemnity, and formality of the proceeding so as to undermine its integrity, fairness, and effectiveness

j. Security risk if witness appears personally in courtroom

k. Any waivers or stipulations

l. Any other factors Ct deems relevant

§ 885.56(2)

3) Denial of videoconferencing not appealable

§ 885.54(2)

4) Moving party, including Ct, must certify that technical and operational standards at Ct and remote location meet statutory requirements in **Sec. A.**1)a.–f. above

3. Use of Fax/e-Filing

A. Definition

§ 134.72(1)(a), § 968.01(1)(c)

Facsimile machines transmit copies of documents via telecommunication facilities

B. Pleadings and other Ct documents

1) Service on Attys

§ 801.14(2)

a. Service by fax on a party's Atty is complete upon transmission

§ 801.14(2)

b. Service by email is complete upon transmission except if the sender receives notification or indication that the message was not delivered

§ 801.15(5)(b)

c. When service by fax, by email, or by e-filing under § 801.18 is between the hours of 5 p.m. and midnight, 1 extra day is allowed for response

2) Filing with Ct of papers not requiring a filing fee

§ 801.16(2)(a)

a. Ct may adopt local rule that permits filing by fax with Clerk of Ct

- Must be to plain-paper fax machine
- Rule shall specify 15-page limit unless specific exception authorized by assigned Judge or Ct Comm'r

§ 801.16(2)(b)

b. If no local rule adopted, assigned Judge or Ct Comm'r may authorize fax filing in specific case

§ 801.16(2)(c)

c. If fax not authorized by local rule or exceeds 15 pages, Atty shall certify that fax filing permitted by assigned Judge

§ 801.16(2)(e)

d. Papers filed by fax are official record of Ct

§ 801.16(2)(e)

e. Papers filed by fax considered filed upon receipt by Clerk of Ct

§ 801.16(2)(f)

- Papers filed by fax completed after regular business hours but by 11:59 p.m. on a particular day will be considered filed on that day, so long as clerk later accepts papers upon review

Kocinski v Home Ins Co
154 Wis. 2d 56 (1990)

f. Stamped fax signature meets "subscribed" requirement for stipulations under § 807.05

C. Evidence issues

1) Authentication

§ 214.75(5)(b)
§ 220.285(2)

a. Bank records

§ 155.70(6)

b. Power of Atty for Health Care

§ 236.25(4)

c. Final plats recorded at the register of deeds

§ 889.29(1)

d. Business records. Fax admissible if the original exists and is available for inspection

4. Remote Court Proceedings

§ 753.24(2m)
§ 757.12

A. Ct may be held with Judge and participants appearing from a remote location, subject to §§ 885.50–.64

§ 804.03(4)

B. Oaths may be administered remotely

CV 10: MOTIONS RELATING TO TRIAL

1. Limine Motions

A. Motion in limine is made before empaneling of jury, usually at pretrial conference or shortly before jury selection

B. Purpose

75 Am Jur 2d *Trial* § 37
1967 Wis L Rev 738

1) To obtain advance ruling on admissibility of certain evidence, which may be inadmissible and prejudicial, to avoid possibility of mistrial

2) To obtain order instructing Attys, parties, or witnesses not to mention certain facts in presence of jury

Filipiak v Plombon
15 Wis. 2d 484 (1962)

a. Often used to prevent mention of

15 Clev-Marshall
L Rev 255 (1966)

- Interest of nonparty insurer on voir dire
- Collateral source of payment
- Fact that plaintiff mother never married
- Fact that plaintiff has venereal disease

Wikrent v Toys R Us
179 Wis. 2d 297
(Ct. App. 1993),
overruled in part on other grounds by
Steinberg v Jensen
194 Wis. 2d 439 (1995)

- Improperly obtained evidence

C. Types of orders

1) Absolute prohibitive order that permanently forecloses witness, party, or Atty from mentioning allegedly prejudicial matter

If granted, results in final ruling in advance on admissibility

2) Preliminary prohibitive order that prohibits mention, but leaves door open to take offer of proof in jury's absence during trial so record can be made and ruling given

Recommendation

This order is often preferable

§ 802.02(2)

D. Motion should be in writing, although frequently made on record at pretrial

Gives Ct advance notice so that it can make studied and informed ruling

St v Sigarroa
2004 WI App 16
269 Wis. 2d 234

E. Suggested enforcement of motion in limine orders to avoid mistrial

1) Before trial, outside presence of jury, inquire of Atty bound by order if each and every witness has been instructed about the order

2) Outside presence of jury, have pertinent witness sworn in. Then inquire if witness:

a. Is aware of motion in limine order

b. Understands what evidence is barred

c. Will abide by the Ct's order

3) Before witness's testimony, reduce motion in limine to writing and have copy served on each witness and counsel

§ 805.03

F. Sanctions for violation of order

§ 804.12(2)(a)1.

1) Matters shall be taken to be established in accordance with claim of aggrieved party

§ 804.12(2)(a)2.

2) Disobedient party prohibited from introducing designated matters in evidence

§ 804.12(2)(a)3.

3) Strike pleadings or parts of them

§ 804.12(2)(a)3.

4) Stay further proceedings until order is complied with or obeyed

§ 804.12(2)(a)3.

5) Grant mistrial, dismiss action, or render default judgment

§ 804.12(2)(a)4.

6) Enter contempt order for disobedience

a. Available in addition to or in lieu of any other sanction listed above

b. Not available for failure to submit to physical or mental examination

§ 804.12(2)(b)

7) Order payment of costs, including reasonable Atty fees

a. Available in addition to or in lieu of any other sanction listed above

§ 805.03

8) Other sanctions as are just with regard to party's disobedience

§ 906.15

2. Exclusion and Separation of Witnesses at Trial

§ 906.15

A. Elements for exclusion of witnesses

1) If requested by party or on Ct's own motion, Judge or Circuit Ct Comm'r shall order witnesses excluded

a. Mandatory language overturns prior case law

Fletcher v St
68 Wis. 2d 381 (1975)

b. Motions strictly interpreted to avoid error

c. Testimony does not include opening statement

2) Following cannot be excluded

a. Party who is natural person

b. Officer or employee of party not a natural person, if designated as that party's representative by its Atty

St v Evans
2000 WI App 178
238 Wis. 2d 411

c. Person shown by a party to be essential, not merely helpful or desirable, to presentation of that party's case

d. Victim in criminal case or delinquency proceeding

- Unless exclusion of victim is necessary to provide fair trial or fact-finding hearing

§ 906.15

B. Elements for separation of witnesses

1) Judge or Circuit Ct Comm'r may

a. Separate all witnesses

b. Order them not to communicate with each other until they have been examined or hearing is ended

State v Copeland
2011 WI App 28
332 Wis. 2d 283

c. Prevent Atty from sharing with nonparty witness testimony of prior witnesses

C. General principles relevant to exclusion and separation of witnesses

Nyberg v St
75 Wis. 2d 400 (1977)
overruled on other
grounds by St v Ferron
219 Wis. 2d 481 (1998)

1) Purpose is to ensure fair trial by preventing witness from conferring in regard to testimony

§ 906.15
Loose v St
120 Wis. 115, 120 (1903)

Exclusion is to remove witnesses from courtroom while separation is to remove witnesses from courtroom to separate areas

2) Discretion of Ct

Nyberg v St
75 Wis. 2d 400 (1977)
overruled on other
grounds by St v Ferron
219 Wis. 2d 481 (1998)

a. Separation of witnesses discretionary with Ct

St v Davis
66 Wis. 2d 636 (1975)
Fletcher v St
68 Wis. 2d 381 (1975)

b. Exclusion is mandatory on request

Waite v St
57 Wis. 2d 218 (1973)
Ramer v St
40 Wis. 2d 79 (1968)

c. Ct or Circuit Ct Comm'r does not erroneously exercise discretion, unless some prejudice to Def can be shown

3) Remedies for violations of orders to exclude, separate, or not to communicate

St v Green
2002 WI 68
253 Wis. 2d 356
overruled on other
grounds by St v Johnson
2023 WI 39
407 Wis. 2d 195

a. When party calling witness participated in violation and prejudice results, Ct may consider barring testimony

b. Proper remedy may be contempt citation

§ 906.11(1)

4) Sec. 906.15 does not prevent Judge or Circuit Ct Comm'r from requiring non-excluded persons to be first witnesses

3. Mistrial

A. Definition

Mistrial Black's Law Dictionary (11th ed 2019)

1) Trial Judge ends trial without determination on merits, because during proceedings there was

a. Procedural error, or

b. Serious misconduct

2) Trial that ends inconclusively because jury cannot agree on verdict

B. General principles

Valiga v Nat'l Food Co 58 Wis. 2d 232 (1973)

1) Granting of mistrial is traceable to Ct's general discretion to control conduct of trial

Valiga v Nat'l Food Co 58 Wis. 2d 232 (1973)
Forman v McPherson 2004 WI App 145 275 Wis. 2d 604

2) Motion for mistrial is addressed to sound discretion of Ct

a. Ruling will not be disturbed in absence of erroneous exercise of that discretion

§ 805.18(1)

b. Ct shall ignore harmless error

- Harmless error is any error not affecting substantial rights of parties

Dutcher v Phoenix Ins 37 Wis. 2d 591, 606 (1968)

- Ct cannot erroneously exercise its discretion in absence of prejudice to substantial rights of parties

C. Time for making motion

Miles v Ace Van Lines
72 Wis. 2d 538, 545
(1976)

1) Motion must be timely

Nimmer v Purtell
69 Wis. 2d 21, 40 (1975)

a. Motion for mistrial should be made immediately following claimed source of error especially misconduct of Atty is claimed error

Kink v Combs
28 Wis. 2d 65, 72 (1965)

b. Motion may be delayed, but should be made no later than when prejudice becomes apparent

Nietfeldt v
Am Mut Liab Ins
67 Wis. 2d 79, 89 (1975)
Wagner v
Am Fam Mut Ins Co
65 Wis. 2d 243, 249
(1974)
Hubbard v Mathis
53 Wis. 2d 306, 307
(1972)

c. In any event, motion must be made before jury returns verdict, if source of error occurred at trial

Comment

- Cases allowing motion to be delayed beyond presentation of evidence involve claimed error in instructions or in closing arguments

D. Waiver

Ash v
Am Fam Mut Ins Co
33 Wis. 2d 592, 601
(1967)
Zweifel v
Milw Auto Mut Ins
28 Wis. 2d 249, 256
(1965)

1) Failure to make timely motion for mistrial waives right to mistrial

Shawver v Roberts Corp
90 Wis. 2d 672, 690
(1979)
Chart v G M Corp
80 Wis. 2d 91, 108 (1977)

2) Rationale behind waiver principle is that it is improper trial tactic for Atty to gamble on favorable verdict before moving for new trial

E. Time for Ct's ruling

Klein v
St Farm Mut Auto Ins
19 Wis. 2d 507, 510
(1963)

1) Subject to Ct's discretion, but nothing is gained by delaying ruling, unless motion is made in final stages of trial

2) Certain errors necessitate immediate ruling

St ex rel Polk v Johnson
47 Wis. 2d 207, 214
(1970)

When juror is withdrawn during course of trial and Attys refuse to proceed with less than statutory number, mistrial must be declared

F. Nature of ruling

St ex rel Polk v Johnson
47 Wis. 2d 207, 214
(1970)
Planer v Smith
40 Wis. 31, 33–34 (1876)

1) In absence of legal insufficiency in presentation of plaintiff's case, granting of mistrial motion must be without prejudice

Forman v McPherson
2004 WI App 145
275 Wis. 2d 604

2) Ct should articulate its consideration of less drastic remedies, such as striking testimony or giving curative instruction

G. Examples of mistrial motions

1) Error attributed to Ct

Keplin v
Hardware Mut Cas
24 Wis. 2d 319, 327
(1964)

Judge may unintentionally deprive party of fair trial by manner of conducting case

Andritsch v Henschel
27 Wis. 2d 461, 464–65
(1965)

2) Error attributed to Atty

a. Defense Atty's reference to plaintiff as "Nazi" in closing argument held not to be grounds for mistrial when plaintiff's Atty had opened issue of plaintiff's past service in German army on voir dire

Andritsch v Henschel
27 Wis. 2d 461, 463–64
(1965)

b. Prejudicial reference to race, nationality, or religion can produce mistrial

Mercurdo v Milw Cty
82 Wis. 2d 781, 793
(1978)

c. Defense Atty's question on voir dire of jury as to whether jury would be prejudiced by fact that they, as taxpayers, would pay favorable verdict for plaintiff was grounds for mistrial

Davey v City of Janesville
111 Wis. 628, 632 (1901)

- Result is different when Atty for plaintiff asks same question

3) Error attributed to jury

Rodriguez v Slattery
54 Wis. 2d 165, 169
(1972)

a. Juror's earlier contact with doctor called as rebuttal witness for defense is not cause for mistrial if juror states contact would not affect judgment

State ex rel Polk
v Johnson
47 Wis. 2d 207 (1970)

b. Without statutory number of jurors and without stipulation to proceed with less than statutory number, litigant is entitled to mistrial when juror withdraws

4) Error attributed to testimony

Valiga v Nat'l Food Co
58 Wis. 2d 232, 254
(1973)

Witness's inadvertent and single mention of insurance man is not sufficient ground for mistrial when insurance not at issue

§ 804.01(3)(b)
§ 804.12(1)(c)

H. Award of reasonable expenses and Atty fees

1) Motion granted

a. Party, deponent, Atty, or all whose conduct or advice necessitated motion must pay

b. Opportunity for hearing

c. Defenses

- Opposition substantially justified

- Other circumstances make it unjust

2) Motion denied

a. Moving party, Atty, or both must pay

b. Opportunity for hearing

c. Defenses

- Motion substantially justified
- Other circumstances make it unjust

3) Motion partly granted/denied

a. Ct has discretion in apportioning expenses

4. Continuance and Delay

A. Granting motion is discretionary

Dietz v Hardware Dealers Mut Fire Ins Co
88 Wis. 2d 496 (1979)
St v Wollman
86 Wis. 2d 459 (1979)
Mogged v Mogged
2000 WI App 39
233 Wis. 2d 90

1) Continuance of trial is not to be granted as matter of course. General considerations:

a. Length of delay requested

b. Whether other counsel available

c. Other continuances requested and received

d. Convenience/inconvenience to parties, witnesses, and Ct

e. Delay for legitimate reasons?

B. Party not prepared—Failure to prosecute or comply with procedure

§ 805.03
Cukrowski v Mt Sinai Hosp

67 Wis. 2d 487 (1975)
Russell v Johnson
14 Wis. 2d 406 (1961)

1) Ct has power to dismiss or grant judgment by default for failure to prosecute or comply with statute governing procedure or Ct order

a. Atty must diligently prosecute action and be prepared to proceed within a reasonable time

§ 804.12(2)(a)

b. Additional sanctions specified

§ 805.03

c. Dismissal on merits, unless Ct in order states otherwise and specifies reasons

Cukrowski v
Mt Sinai Hosp
67 Wis. 2d 487 (1975)
Russell v Johnson
14 Wis. 2d 406 (1961)

2) Ct has duty and inherent power independent of statute to discourage protraction of litigation, including power to dismiss for

a. Lack of prosecution

Buchanan v Gen Cas Co
191 Wis. 2d 1
(Ct. App. 1995)

b. Failure to comply with scheduling order

Neylan v Vorwald
124 Wis. 2d 85 (1985)

3) Notice must be given of potential dismissal

C. Absence or discharge of Atty

Phifer v St
64 Wis. 2d 24 (1974)
St v White
53 Wis. 2d 549 (1972)
Wujcik v
Globe & Rutgers Ins
189 Wis. 366 (1926)

1) Conflicting trial responsibilities of Atty do not necessarily entitle Atty to continuance when sufficient prior notice was given and other members of firm are available

Phifer v St
64 Wis. 2d 24 (1974)
Medved v Medved
27 Wis. 2d 496 (1965)

2) Discharge of Atty does not entitle party to continuance as matter of right

a. Consider

- When firing occurred
- Reasons for firing
- Number of prior Attys
- Length of delay
- Inconvenience to other parties, witnesses, and Ct
- Any other relevant facts

D. Absence of witness

Dietz v Hardware Dlrs Mut Fire Ins 88 Wis. 2d 496 (1979)
Page v Am Fam Mut Ins, 42 Wis. 2d 671 (1969)

1) If motion is based on absence of witness, it must be shown that

   a. Witness's testimony would be material

   b. Testimony not cumulative

   c. Diligence was exercised in procuring witness's presence or deposition

   d. Would be prejudicial to proceed without witness's testimony

Fredrickson v Louisville Ladder Co 52 Wis. 2d 776, 784 (1971)
Paper Mach Corp v Nelson Foundry Co 108 Wis. 2d 614, 624–25 (Ct. App. 1982)

E. Surprise witness

1) Continuance may be granted in discretion of Ct to allow party to prepare for surprise witness

2) Exclusion of surprise witness is drastic remedy to be used infrequently

3) Ct has discretion to allow party claiming surprise to depose witness during course of trial

Dobbratz Trucking & Excavating v PACCAR, Inc
2002 WI App 138
256 Wis. 2d 205

F. Surprise evidence or defense

1) Witness exercising or withdrawing 5th Amendment right in civil case, see **CV15—Trial Evidence, Sec. 1**

§ 802.09(2)
Zobel v Fenendael
127 Wis. 2d 382
(Ct. App. 1985)

2) If during trial, Ct allows evidence to be received that is not within issues raised by pleadings or determined at pretrial, Ct may grant continuance to enable party to meet the evidence

Dobbratz Trucking & Excavating v PACCAR, Inc
2002 WI App 138
256 Wis. 2d 205

3) Continuance preferred method for reducing prejudice

4) However, when continuance not practical or justified, motion in limine may be granted

G. Absence of party

Est of Hatten v 1st Wis Tr
233 Wis. 256 (1940)
Schamper v Ullrich
131 Wis. 524 (1907)

1) Strong showing to justify absence required

Schweitzer v Doepke
195 Wis. 341 (1928)

2) Consider whether outcome would probably differ in party's absence

H. Terms

Zutter v Kral
268 Wis. 606 (1955)

No continuance granted (unless by consent of parties) except on immediate payment of fees of witnesses in actual attendance and reasonable Atty fees

5.

Redacting and Sealing Court Records, see CV 5, Secs. 11 and 12

CV 11: EMPANELING OF JURY

1. Jury Panel

§ 756.001

A. All persons selected for jury service shall be selected at random from a fair cross-section of the population of the area specifically served by the Ct

§ 756.30(1m), (2m)

B. Fine for nonattendance

If summoned juror fails to attend without sufficient excuse, Ct may impose fine of up to $500

St v Block
170 Wis. 2d 676
(Ct. App. 1992)

C. Jury sworn before serving

2. Juror Qualifications

§ 756.02

A. Jurors must be

1) Citizens of US

St v Carlson
2003 WI 40
261 Wis. 2d 97

2) Able to understand English language

§ 756.28(2)

3) Not summoned as juror within 4 years

§ 756.28(1)

Unless time period otherwise established by Judges in circuit

§ 756.02
St v Wyss
124 Wis. 2d 681 (1985)

4) Residents of circuit in which called to serve

§ 756.03

5) Person may be excused if cannot fulfill responsibilities of juror

Structural, physical, or architectural barriers not to be considered

§ 756.02

6) Resident who has been convicted of a felony not qualified to serve unless civil rights have been restored

3. Jury Service

§ 756.28

A. Can only be called once every 4 years

Unless time period otherwise established by Judges in circuit

B. Availability for service shall not exceed 31 consecutive days

C. Not required to serve as a juror for a total of more than 5 days of actual Ct attendance

Unless more days needed to complete service in a particular case

4. Challenge to the Array

Brown v St
58 Wis. 2d 158 (1973)

A. Must be made before empaneling jury

B. Burden

Brown v St
58 Wis. 2d 158 (1973)
St v Holmstrom
43 Wis. 2d 465 (1969)
St v Loukota
180 Wis. 2d 191
(Ct. App. 1993)

1) Party challenging validity of jury array has burden to prove prima facie case of discrimination

2) Elements

Wilson v St
59 Wis. 2d 269 (1973)
St v Holmstrom
43 Wis. 2d 465, 472
(1969)

a. Exclusion must be systematic and intentional

JEB v Alabama ex rel TB
114 S. Ct. 1419 (1994)
Wilson v St
59 Wis. 2d 269 (1973)
St v Holmstrom
43 Wis. 2d 465, 472
(1969)

b. Exclusion is of some representative class of citizens (including age, race, and sex, and gender)

3) Methods of proof

Wilson v St
59 Wis. 2d 269 (1973)

St v Holmstrom
43 Wis. 2d 465, 472
(1969)

Disproportionate representation of class of citizens in jury array over period of time

Wilson v St
59 Wis. 2d 269 (1973)

4) If challenging party establishes prima facie case

a. Burden shifts to State

b. State must show disproportion was not intentional or systematic

C. Following held not discriminatory

St v Burnett
30 Wis. 2d 375 (1966)

1) Minority disparity between proportion of African Americans in population and jury list is not prejudicial when race plays no part in selection

Lockhart v McCree
106 S. Ct. 1758 (1986)
St v Loukota
180 Wis. 2d 191
(Ct. App. 1993)

2) Removal of jurors who previously acquitted Def in an unrelated case, unless showing that jury that heard case did not consist of jurors who conscientiously applied the law

Swain v Alabama
85 S. Ct. 824 (1965)
Brown v St
58 Wis. 2d 158 (1973)

3) Accused has no constitutional right to venire or jury panel composed of members, or having even single member, of accused's class, race, or sex

St v Bond
41 Wis. 2d 219 (1969)

4) Def is not entitled to perfectly apportioned representation, but only to fair jury from panel selected without regard to race

Oliver v
Heritage Mut Ins Co
179 Wis. 2d 1
(Ct. App. 1993)

5) Ct may not vary from random selection by intentional placement of a minority on jury panel, even if well-intentioned

§§ 756.04–.06

D. Prospective jurors

1) Annually, DOT to submit to Office of Director of State Cts a list of each person with Wis driver license or DOT-issued identification card

2) Office of Director of State Cts may create a master list by using DOT list and one or more of the following

a. List of registered voters from Elections Comm'n

b. List of persons who may have filed Wis income tax return with Dept of Revenue

c. List of child support payers and payees from DWD

d. Lists of recipients of unemployment insurance from DWD

e. Lists of Wis residents who have been issued approvals or licenses from DNR

3) Office of Director of State Cts to forward to each Clerk of Ct list of prospective jurors, created by selecting names at random from master list

4) Clerk of Ct to summon sufficient prospective jurors to appear for jury service

a. At least 12 days before first day on which jury required to be present

b. May be served by first-class mail

5. Excuses and Deferrals

§ 756.03(1)

A. Excuses

1) A person may be excused from jury service by order of Judge

2) To excuse, Judge must make finding that person cannot fulfill responsibilities of a juror

St v Coble
100 Wis. 2d 179,
213–14 (1981)

3) Personal predilection not to serve as juror, standing alone, is not basis for exemption

§ 756.03(2)

B. Deferrals

1) Upon request of person, Judge may defer to later day, set by Ct, the period in which person must serve as juror

2) Judge must make finding that jury service would entail

a. Undue hardship, or

b. Extreme inconvenience, or

c. Serious obstruction or delay in fair and impartial administration of justice

§ 756.03(3)

C. Judge may authorize Clerk of Ct to grant excuses or deferrals

§ 756.07

6. Insufficient Jurors

Stanley v Deppisch
No. 08-cv-0164-BBC
2009 WL 62155, at *3
(WD Wis Jan 8, 2009)
(unpublished)

A. When a sufficient number of jurors cannot be obtained for a trial from the jury venire supplied, the Ct may:

1) Order the sheriff to bring before the Ct persons in the area

2) The Ct then determines whether the persons brought by the sheriff have the qualifications and ability to serve as jurors for a particular trial

3) Alternatively, counsel could stipulate to fewer strikes or smaller jury

CV 12: VOIR DIRE/SELECTION OF JURY

§ 805.08(1)

1. By the Court

SCR 71.01

A. Must be on the record

B. Oath to array before voir dire is substantially as follows: "You and each of you do solemnly swear or affirm you will true answers make to such questions put to you in regard to your competence to sit as jurors wherein _____ is plaintiff and _____ is Def"

Stoppleworth v
Refuse Hideaway, Inc
200 Wis. 2d 512 (1996)

C. Judge must advise as to all parties, including insurance companies

D. Ct to examine each juror under oath to discover whether juror

1) Is related by blood, marriage, or adoption to any party or Atty appearing in case

2) Has financial interest in case

3) Has expressed or formed any opinion

4) Is aware of any bias or prejudice

Hammill v St
89 Wis. 2d 404 (1979)

E. Control of voir dire examination rests primarily with Ct

1) Broad discretion as to form and number of questions to be asked

2) Essential demands of fairness guide

a. Ct's exercise of discretion, and

b. Ct's restriction on inquiries

§ 805.08(1)

2. By the Attorneys

SCR 71.01

A. Must be on the record

B. Either Atty may supplement Ct's examination as to juror's qualifications

1) Limitations

a. Examination shall not be repetitious, and

b. Examination shall not be based on hypothetical questions

2) Any party objecting for cause may introduce evidence in support of the objection

3) Ct should allow considerable latitude

a. To permit discovery of possible disqualification for cause, and

b. To permit reasonable basis for exercising peremptory challenges

C. Nature and latitude of questions

1) Generally Attys should not be permitted to

a. Introduce extraneous prejudicial information

b. Argue case by form of questions

c. Indoctrinate jury

d. Unduly visit and establish rapport

e. Seek to obtain improper commitment from jury

f. Ask questions assuming debatable instructions of law

2) Line delineating improper and proper examination is not sharp

Recommendation

a. To check overly broad questions by Attys: "Counsel, I think we are departing from an inquiry of the juror's qualifications"

St v Ferron
219 Wis. 2d 481 (1998)
Mainville v St
173 Wis. 12 (1920)

3) Prohibited questions are those that

a. Mislead panel members

b. Misinform panel members

c. Confuse panel members as to their responsibility in reaching a verdict

§ 805.08(1)

d. Are repetitious

e. Badger or harass

f. Are designed to establish rapport with jury such as conversational or "visiting" questions

g. Tend to entrap, influence, commit, or obtain pledge from juror to decide in advance

h. Are irrelevant to determination of juror's qualifications

i. Relate to instructions Ct will cover

j. Contain inadequate or incorrect statement of law

§ 805.08(1)

k. Are hypothetical

l. Ask for pledge

3. Individual Voir Dire

SCR 71.01

A. Must be on the record

Individual voir dire is public proceeding

B. Within sound discretion of Ct

C. When to use

1) Major case with substantial pretrial publicity

St v Dean
67 Wis. 2d 513 (1975)
St v Herrington
41 Wis. 2d 757 (1969)

Private interrogation of prospective jurors as to prejudice attributable to pretrial publicity not required

2) Sensitive questions will be asked

3) Risk that juror's response will prejudice entire panel

4. Three Forms of Bias: Statutory, Subjective, and Objective

St v Thomas
2021 WI App 55, ¶ 41
399 Wis. 2d 277
aff'd on other grounds
2023 WI 9
405 Wis. 2d 654

A Def is guaranteed the right to an unbiased jury under both the US and Wis Constitutions. This State recognizes three classifications of juror bias: statutory, subjective, and objective.

§ 805.08(1)
St v Faucher
227 Wis. 2d 700 (1999)

A. Statutory bias—Mandatory strike

1) Blood, marriage, or adoption relationship

a. Party and juror

b. Atty and juror

2) Those who have financial interest in case

a. In outcome of another case, which will be affected by outcome in present case, or

b. As stockholder of corporate party, unless interest is infinitesimal

c. Interest need not be considerable to lead to inference of bias

50A CJS *Juries* § 380
(2019)

d. Former creditor-debtor or bank-depositor relationships alone do not disqualify

Milw Steel Type & Die
v Am Cent Ins
164 Wis. 298 (1916)

e. Generally employee or employer of party held incompetent to sit as juror for other's cause

CAUTION

3) Certain references in § 805.08 in fact constitute subjective bias (see below)

St v Faucher
227 Wis. 2d 700 (1999)

B. Subjective bias—Applies to individual juror

1) Revealed through words and demeanor of prospective juror

2) Exists if juror is not reasonable person sincerely willing to set aside any opinion or prior knowledge

3) May not always be susceptible to direct proof, rather might only be revealed through juror's demeanor

§ 805.08

4) Knowledge or opinion

a. Knowledge or information

Hoppe v St
74 Wis. 2d 107 (1976)

- Informed juror not to be equated with biased juror

- Familiarity with specific facts will not, by itself, disqualify juror

St v White
68 Wis. 2d 628 (1975)
Holland v St
87 Wis. 2d 567
(Ct. App. 1979)
rev'd on other grounds
91 Wis. 2d 134 (1979)

- Learning facts of case through media does not disqualify, unless juror biased thereby

b. Formation or expression of opinion

- Juror's expression of opinion on guilt alone not disqualifying

Hammill v St
89 Wis. 2d 404 (1979)
St v Sarinske
91 Wis. 2d 14 (1979)
overruled on other grounds by
St v Wayerski
2019 WI 11
385 Wis. 2d 344
Holland v St
91 Wis. 2d 134 (1979)

- Juror can qualify as impartial trier of fact if can lay aside opinion, and can render verdict based on evidence in Ct

5) Social prejudice

a. Proper inquiry necessary regarding social or economic prejudice, when

- Such prejudice related to issues, and

- Inquiry essential for intelligent exercise of peremptory challenges

b. Rule also applies to

Gatzow v Buening
106 Wis. 1 (1900)

- Bias toward or against unions

Boldt v St
72 Wis. 7 (1888)

- Bias because of membership in certain club

6) Political affiliation

a. Permissible to inquire whether by reason of party's known politics jurors could give party a fair trial

b. Improper to inquire generally about political affiliations or predilections in absence of special reason

7) Religious beliefs

a. Inquiry not permissible, when

- No religious issue exists, or

- Circumstances exist that would raise possibility of religious prejudice

b. Inquiry permissible if by reason of juror's religion juror could not give fair trial

8) Race or nationality

a. Prejudice for or against races or nationalities may be proper subject of inquiry

b. Circumstances must exist that raise possibility of prejudice

Kohler v West Side RR
99 Wis. 33 (1898)

9) Similar employment

In case involving transport company, mere fact that juror was employed by another transport company does not disqualify without showing of nature of job

St v Lindell
2001 WI 108
245 Wis. 2d 689
St v Faucher
227 Wis. 2d 700 (1999)

St v Zurfluh
134 Wis. 2d 436
(Ct. App. 1986)

10) Personal acquaintance

Juror's acquaintance with party or witness without more does not disqualify juror. However, Ct must inquire as to subjective or objective bias

11) Prior similar litigation

a. May inquire

- If juror involved in similar litigation or accident, and
- If such litigation presently pending

b. Juror not incompetent

- If juror previously maintained similar suit or was sued, and
- If Ct satisfied juror can hear and decide case impartially

12) Attitude

a. Sympathy for plaintiff in injury suit does not automatically disqualify juror, provided juror thinks

- Can set sympathy aside, and
- Can render just verdict

St v Faucher
227 Wis. 2d 700 (1999)

C. Objective bias—Applies to class to which juror belongs

1) Could reasonable person in juror's position be impartial?

St v Thomas
2021 WI App 55, ¶ 41
399 Wis. 2d 277
aff'd on other grounds
2023 WI 9
405 Wis. 2d 654

2) To assess objective bias, the Ct must consider the facts and circumstances surrounding the voir dire and the facts involved in the case, but the emphasis remains on the reasonable person in light of those facts and circumstances

St v Oswald
2000 WI App 3
232 Wis. 2d 103

3) Prospective juror objectively biased when that person has

a. Direct link to crucial evidence, or

b. Direct connection to a dispositive issue in case, or

c. Intractable negative attitude toward justice system

Recommendation

4) Engage in a thorough voir dire when a party challenges a juror through the class to which the juror belongs

St v Faucher
227 Wis. 2d 700 (1999)
St v Delgado
223 Wis. 2d 270 (1999)

5) Some classes are so fraught with potential bias that objective bias exists because of surrounding facts and circumstances regardless of the juror's assurances of impartiality

St v Gesch
167 Wis. 2d 660 (1992)

Prospective jurors related to witness by blood or marriage to third degree must be struck from panel on basis of objective bias as a matter of law

6) Insured-insurer relationship

a. Policyholder's bias depends on Ct's determination of fact in view of

- All evidence presented
- Mental characteristics disclosed by juror in presence of Ct

Kanzenbach v
SC Johnson & Son
273 Wis. 621, 627 (1956)

b. It is a good rule for the Trial Judge to honor challenges for cause whenever he or she may reasonably suspect that circumstances outside the evidence may create bias or an appearance of bias on the part of the challenged juror

Good v
Farmers Mut Ins Co
265 Wis. 596 (1954)

c. Fact that Ct did not excuse juror whose husband was policyholder and five others who were also policyholders is not prejudicial or erroneous exercise of discretion

St v Kiernan
227 Wis. 2d 736, 749
(1999)

7) Veteran jurors

a. When subsequent trial with facts and issues nearly identical to initial trial, party will need to make individualized showing that particular juror is objectively biased

Caution

b. Veteran juror bias may be objective or subjective depending on the circumstances

St v Mendoza
227 Wis. 2d 838 (1999)

8) Jurors with criminal record

Not automatically a class that is objectively biased

5. Challenge for Cause and Ruling

Recommendation
St v Lindell
2001 WI 108
245 Wis. 2d 689
St v Ferron
219 Wis. 2d 481 (1998)

A. Err on side of striking prospective jurors who appear to be biased

B. Challenge

1) Time for making

St v Jones
218 Wis. 2d 599
(Ct. App. 1998)

a. Must be made before jury is sworn

b. Failure to make timely challenge operates as waiver of error

St v Williams
2000 WI App 123
237 Wis. 2d 591

- Sua sponte action not required if concerns not raised by counsel

c. Ct may in its discretion and for good cause allow challenge after jury sworn

d. Ct may disqualify juror on own motion

2) Grounds

a. Particular grounds must be stated, unless obvious and sufficiently disclosed

3) Denials

a. Denials of proposed questions or objections to jurors should be put on record

St v Mendoza
227 Wis. 2d 838 (1999)

4) No limitation on number of challenges for cause

5) Erroneous dismissal of prospective juror does not result in additional peremptory strike

C. Waiver

McGeever v St
239 Wis. 87 (1941)
Osmundson v Lang
233 Wis. 591 (1940)
Brown v
LaCrosse City Gas
21 Wis. 51 (1866)

1) Failure to question jurors and develop disqualification constitutes waiver of all objections

2) Failure to promptly advise Ct of disqualification of juror coming to light during trial constitutes waiver

Ullman v St
124 Wis. 602 (1905)
Gatzow v Buening
106 Wis. 1 (1900)

3) Unsuccessful challenge to juror or improper exclusion of question waived by failure to object to jury as a whole

Davey v City of Janesville
111 Wis. 628 (1901)

4) Signifying satisfaction with jury as constituted estops challenge on appeal of correctness of ruling

D. Ct's analysis regarding ruling

St v Ferron
219 Wis. 2d 481 (1998)

1) Two-prong test

a. First prong—Can Ct find that prospective juror is reasonable person sincerely willing to put aside opinion or prior knowledge?

St v Oswald
2000 WI App 3
232 Wis. 2d 103

- Juror need not affirmatively state he/she can definitively set aside bias

b. Second prong—Can Ct find that reasonable person in juror's position could set aside the opinion or prior knowledge?

St v Lindell
2001 WI 108
245 Wis. 2d 689
St v Ferron
219 Wis. 2d 481 (1998)
Kanzenbach v
SC Johnson & Son
273 Wis. 621 (1956)

2) Good rule for Judge to honor challenges whenever it is reasonable to suspect circumstances may create bias or appearance thereof on part of challenged juror

St v Oswald
2000 WI App 3
232 Wis. 2d 103

a. However, wide deference will be given to Trial Ct's determination of subjective or objective bias (or lack thereof)

Committee comment

b. Recent Ct decisions emphasize importance of Trial Ct making thorough record concerning juror sincerity and demeanor

§ 805.18(2)
St v Lindell
2001 WI 108
245 Wis. 2d 689

3) The substantial rights of a party not affected if party compelled to use single peremptory challenge to remove challenged juror

US v Chapman
158 F2d 417 (1946)

4) Right to challenge goes to exclude, not to include a specific juror

St v Coble
100 Wis. 2d 179, 213
(1981)

5) Juror not to be disqualified for cause solely because of a personal predilection not to serve

St v Lamon
2003 WI 78
262 Wis. 2d 747

6. Peremptory Challenges

A. Procedure

§ 805.08(3)

1) Each party entitled to 3 peremptory challenges exercised alternately, beginning with plaintiff

St v Erickson
227 Wis. 2d 758 (1999)

a. No presumption of actual prejudice when parties denied proper number of peremptory challenges

2) When any party declines to challenge in turn, challenge is made by clerk by lot

3) All plaintiffs deemed one party and all Defs other party

a. When 2 or more Defs have adverse interests, Ct in its discretion may allow each Def 3 strikes

- Consider due protection of their interests

4) If additional jurors empaneled, each side entitled to one peremptory challenge

St v Nantelle
2000 WI App 110
235 Wis. 2d 91

5) No peremptory strikes may be exercised after both parties have accepted jury, even though jury not sworn

Recommendation

After clerk reads juror names, Ct may wish to ask: "Are counsel satisfied with the jury as selected?"

Edmonson v
Leesville Concrete Co
111 S. Ct. 2077 (1991)

B. Purposeful discrimination against jurors—To exclude on basis of race or gender

Powers v Ohio
111 S. Ct. 1364 (1991)
St v Guerra-Reyna
201 Wis. 2d 751
(Ct. App. 1996)

1) Juror cannot be excluded because of race

JEB v Alabama ex rel TB
114 S. Ct. 1419 (1994)
St v Jagodinsky
209 Wis. 2d 577
(Ct. App. 1997)

2) Juror cannot be excluded because of gender

St v King
215 Wis. 2d 295
(Ct. App. 1997)

3) If explanation for challenge is in part based on discriminatory reason it is a violation of the Equal Protection Clause

State v Lamon
2003 WI 78, ¶¶ 27–32
262 Wis. 2d 747

4) Process

a. If opponent makes prima facie showing of discrimination

b. Striker must make race-neutral explanation

c. Ct must decide whether opponent has proved purposeful discrimination

5) See **Criminal Benchbook** for additional information

7. Additional Jurors

A. General rules

§ 805.08(2)

1) Ct may order additional jurors to be empaneled

2) All jurors shall be seated in the jury box and attend the trial at all times

3) If number of jurors remains at more than 12 at time of submission for final determination, Ct shall determine by lot which jurors shall not participate in final deliberations

4) Ct may hold additional jurors (alternates) until verdict is rendered or discharge them at any time

B. If additional jurors are to be empaneled, consider pretrial stipulation to permit all jurors to deliberate and reach verdict. For example, stipulate that 11 of 13 (or 12 of 14) jurors must agree

8. Bias of Juror Determined After Jury Empaneled

St v *Gonzalez*
2008 WI App 142, ¶ 21
314 Wis. 2d 129

A. Ct's duty to ensure empaneled jury is impartial, free from bias or prejudice

St v Gonzalez
2008 WI App 142
314 Wis. 2d 129

B. It is permissible to excuse a biased juror and replace that juror with an alternate

9. Swearing in Jury

A. Oath or affirmation must be administered to jurors selected to try case

"Do you and each of you swear (or affirm) that you will well and truly try the issue joined between _____, plaintiff, and _____, defendant, and, unless discharged by the Court, a true verdict give, according to law and the evidence given in Court, so help you God?"

State v Lepsch
2017 WI 27, ¶¶ 39–43
374 Wis. 2d 98

Clerk may administer oath to jury

St v Block
170 Wis. 2d 676
(Ct. App. 1992)

B. Swearing jury after testimony begins, but before deliberations, requires harmless error analysis; does not warrant reversal unless Def shows prejudice

CV 13: JURY MANAGEMENT PROBLEMS

§ 805.08(4)

1. Jury View

A. Availability

1) Upon motion of any party

2) Jury may be taken to view

a. Any property relating to controversy between parties, or

b. Any matter or thing relating to controversy between parties

3) Moving party to pay expenses of view

Expenses taxed afterwards like other legal costs, if party who incurred them prevails

Max L Bloom Co
v US Cas Co
191 Wis. 524 (1927)

B. Guidelines

1) Determination

a. Subject to sound discretion of Ct

§ 805.08(4)

b. Grant when it appears that view is necessary to just decision

Max L Bloom Co
v US Cas Co
191 Wis. 524 (1927)

2) Consider

a. Sufficiency of other evidence

b. Availability of adequate and admissible photographs, designs, or maps

c. Familiarity of jury with subject premises

d. Degree to which jury would be assisted in understanding, evaluating, and applying testimony of witnesses

e. Expense, delay, and inconvenience

f. Change in scene after occurrence in issue

St v Herrington
41 Wis. 2d 757 (1969)
St v Marshall
92 Wis. 2d 101 (1979)

- Scene should be at least "approximately" same as at time in issue

C. Procedure

1) Encourage requests for view before trial so that attendant administrative matters can be arranged without delaying trial

Heintz v Schenck
176 Wis. 562 (1922)
Ohrmundt v Spiegelhoff
175 Wis. 214 (1921)
Haswell v Reuter
171 Wis. 228 (1920)
WIS JI-CR 152

2) Purpose is to aid jury in understanding and weighing evidence NOT to obtain new evidence

3) Ct should instruct jury on purpose of view and set down ground rules for conduct of all participating before actual view

4) Ground rules

a. Determine who is to accompany jury and how they will travel to and from scene

Berg v DeGreef
37 Wis. 2d 226 (1967)
Moritz v Larsen
70 Wis. 569 (1888)

b. Judge and reporter should be present

c. Attention of jury should be directed by Ct to certain matters determined in advance in consultation with Attys and done in neutral manner

d. Attys shall not communicate or intermingle with jurors

e. All statements of Ct and Attys to Ct should be reported

f. Questions by jurors should be discouraged, but reported if asked

g. Jurors should be instructed to remain in group and to obey Ct's directions to ensure integrity of procedure and their safety

D. Timing

Practice appears to be to take view after opening statements and before taking of testimony, but consider doing it after testimony of situs has been taken

E. Juror misconduct

Fantin v Mahnke
113 Wis. 2d 92, 99–100
(Ct. App. 1983)

1) Juror's unauthorized view, which may have affected verdict, can be reason for new trial

a. Bifurcated analysis is required:

- Was juror's authorized view prejudicial per se?
- If not, did unauthorized view have an actual prejudicial effect on verdict?

2) Right to new trial is waived if party entitled to complain fails to do so

2. Jury Note-Taking

§ 805.13(2)

A. Determination made after jury sworn

B. Note-taking authorized

1) Judge must instruct jury that

a. Note-taking permissible during proceedings

b. Note-taking not permissible during opening statement, closing arguments

c. Ct will provide note-taking materials upon request

d. Notes are confidential

e. Jurors may refer to notes during proceedings and deliberation

2) Notes may not be basis or object of motion by any party

3) After verdict, Ct to ensure notes are collected and destroyed

C. If note-taking not authorized, Ct must state reasons on the record

3. Questioning by Jurors

A. Authority

1) Inherent power under common law

§ 906.11

2) Judge shall exercise reasonable control over mode and order of interrogating witnesses

B. Suggested procedure

1) Give preliminary instruction

2) Permit only written questions

3) Review each question with Attys at sidebar or in chambers, affording opportunity to object outside presence of jury

4) Judge asks questions which are proper under rules of evidence

5) Attys may ask follow-up questions

4. Communications with Jury

A. By Judge

Wiedenhaupt v Hoelzel
254 Wis. 39 (1948)
Dralle v
Town of Reedsburg
140 Wis. 319 (1909)

1) All proceedings should be open, public, and in presence of parties whenever practicable to provide opportunity to participate and take exception if dissatisfied

2) No communication with jury after case submitted, except

a. In open Ct, and

b. With due regard to rights of parties

St v Stewart
56 Wis. 2d 278 (1972)
St v Russell
5 Wis. 2d 196 (1958)

3) Attys have right to be present when additional instructions are requested

St v White
53 Wis. 2d 549 (1972)
St v Ritchie
46 Wis. 2d 47 (1970)

a. Right is waived by Atty by absence from courtroom during regular session of Ct

St v Stewart
56 Wis. 2d 278 (1972)

b. When Atty absent from courtroom, Ct can presume waiver, unless

- Ct has been informed to the contrary, or
- Ct has personally taken responsibility to see that Atty is notified

Rowden v Am Fam Ins
48 Wis. 2d 25 (1970)

4) Unless there is prior waiver, Ct should not communicate in person with jury in courtroom or jury room in absence of Attys

B. By bailiff

Seitz v Seitz
35 Wis. 2d 282 (1967)

1) Bailiff is not to speak to jury about merits of case other than to inform jurors that all communications are to be by presiding juror and in open Ct

Pollack v Olson
20 Wis. 2d 394 (1963)
Ketchum v
Chi St P M & O Ry
150 Wis. 211 (1912)

2) Bailiff should not undertake to answer any questions regarding merits of case

3) Bailiff should not provide information

C. Re-reading testimony

Patterson v Phillips
216 Wis. 165 (1934)

1) Ct has reasonable amount of discretion in determining whether evidence should be read or not on request of jurors

Wegner v Chi & NW Ry
262 Wis. 402 (1952)

Ct may deny re-reading of testimony requested by jury through bailiff without calling jury to courtroom

Jones v St
70 Wis. 2d 41 (1975)

2) Ct vested with large discretion as to how much of evidence should be read upon jurors' request

Willard v St
195 Wis. 170 (1928)

a. Duty of Attys outside presence of jury to direct Ct's attention to important parts omitted

b. Good practice to seek stipulation on record as to what portions should be read

D. Reinstructing jury

1) Recall to correct error

Ruck v Milw Brewery
148 Wis. 222 (1912)

a. Ct has duty to recall to correct omission or error in charge to jury

Smuda v Milw Cty
3 Wis. 2d 473 (1958)

b. On reinstruction it should be pointed out that latter instruction is given to correct former instruction

2) In response to jury request

Ulrich v Schwarz
199 Wis. 24 (1929)

a. Duty to instruct on request if original charge is insufficient

Bengston v Estes
260 Wis. 595 (1952)

b. Discretionary on part of Ct to supplement instructions when original instructions were correct

Thoreson v Milw &
Suburban Transp
56 Wis. 2d 231 (1972)
Misiewicz v Waters
23 Wis. 2d 512 (1964)

- Necessity and extent of additional instructions rests in discretion of Judge

Fehrman v Smirl
25 Wis. 2d 645 (1964)

- Ct's response to jury request for additional instructions does not constitute overemphasis

3) On the record

Rowden v
Am Fam Ins Co
48 Wis. 2d 25 (1970)
Ulrich v Schwarz
199 Wis. 24 (1929)

Instructions should be given in courtroom and reduced to writing

4) Presence of Attys

Thoreson v
Milw & S Trans
56 Wis. 2d 231 (1972)
Behling v Lohman
30 Wis. 2d 519 (1966)
Walczakowski v Milw
Elec Ry & Light Co
157 Wis. 191 (1914)

Although it is desirable to allow Attys reasonable notice of request for reinstruction and to be present for reinstruction, Ct is under no duty to send or wait for Atty

E. Hung jury

Hardt v Chi M & St P Ry
130 Wis. 512 (1907)

1) Ct may inquire as to progress of jury and offer aid by way of further instruction or reading of evidence

2) Judge's duty

Barlow v Foster
149 Wis. 613 (1912)

a. Judge has duty to urge jurors to reach agreement if such can be reasonably done

- In so doing, admonish jury of public and private importance of using their best efforts, provided jurors are not coerced to surrender their deliberate, honest judgment

Quarles v St
70 Wis. 2d 87 (1975)

b. Sua sponte delivery of supplemental instructions is not invasion of province of jury

§ 805.13(5)

3) Reinstruction authorized

4) Form

a. Use WIS JI-CV 195 Supplemental Instruction on Agreement

Ziegler v St
65 Wis. 2d 703 (1974)

- Better not to embellish standard instruction by reference to cost and hard work involved in jury trial

St v Lehman
108 Wis. 2d 291, 301
(1982)

F. Juror illness

1) Ct may discharge a juror who becomes ill during trial or deliberations

Counsel should be given opportunity to be present when ill juror is discharged

2) Judge's duty

a. Indicate, on record, how Judge became aware of illness

b. Establish extent of illness

c. Determine whether juror could resume duty after short rest

3) If juror is excused during trial

a. Substitute alternate juror, if available, or

b. Obtain stipulation to proceed with less than number demanded, or

c. Declare a mistrial

St v Lehman
108 Wis. 2d 291, 313
(1982)

4) If juror is excused during deliberations

a. Obtain stipulation to proceed with less than number demanded, or

b. Obtain stipulation by parties to substitute alternate juror, if available, or

c. Declare a mistrial

St v Hampton
201 Wis. 2d 662
(Ct. App. 1996)

G. Inattentive juror

1) On sufficient showing of juror inattentiveness, Ct must

a. Engage in fact-finding to establish basis for exercise of discretion. Considerations

- Length of inattentiveness
- Importance of testimony missed
- Whether such inattention was prejudicial

2) Upon showing, it is error to foreclose further inquiry

St v Saunders
2011 WI App 156, ¶ 32
338 Wis. 2d 160

3) Must bring to Ct's attention or issue waived/forfeited on appeal

H. Discharge for cause

St v Lehman
108 Wis. 2d 291, 300
(1982)

1) During trial or deliberations a juror may ask to be excused for cause or a party may seek to discharge a juror for cause

2) Judge's duty

Callan v
Peters Constr Co
94 Wis. 2d 225, 248
(Ct. App. 1979)

a. Conduct a voir dire of juror outside presence of other jurors

b. Allow Attys to question juror

c. Arguments on potential discharge of juror shall be conducted outside presence of jury, including juror subject to discharge

Committee Comment

d. Exercise extreme caution to avoid mistrial by prejudicing the jury, in some manner, by exposure to the proceedings

3) Grounds for discharge of juror for cause during trial or deliberations are extremely limited

a. Only if Ct is satisfied that juror cannot render a fair and impartial decision

b. Juror's personal desire to no longer serve is insufficient reason to discharge for cause

4) If juror is excused for cause during trial

a. Substitute alternate juror, if available, or

b. Obtain stipulation to proceed with less than number demanded, or

c. Declare a mistrial

See § 805.08

5) If juror is excused for cause during deliberations

a. Obtain stipulation to proceed with less than number demanded, or

b. Obtain stipulation by parties to substitute alternate juror, if available, or

c. Declare a mistrial

5. Misconduct

Manke v
Physicians Ins Co of Wis
2006 WI App 50
289 Wis. 2d 750

A. Extraneous information—examples

§ 906.06(2)
Ford v US
233 F2d 56 (1956)

1) Newspaper accounts relating to trial

2) Unauthorized view, see **Sec. 1.E.**, *supra*

3) Experiments

31 ALR4th 566 (1984)

Improper for jury to conduct experiments that create evidence not offered at trial

Manke v
Physicians Ins Co of Wis
2006 WI App 50
289 Wis. 2d 750

4) Procurement and use of written materials, including dictionary definitions

Manke v
Physicians Ins Co of Wis
2006 WI App 50
289 Wis. 2d 750

B. Procedure when jurors have been exposed to extraneous information

1) Ct may grant evidentiary hearing on motion for new trial after initial showing via affidavit that

See § 906.06(2)

a. Statements of juror(s) are competent and concern the extraneous information and not deliberative process

b. Statements of juror(s) are clear and convincing evidence of extraneous information that is potentially prejudicial

2) Evidentiary hearing

a. To evaluate credibility of initial statements

b. To obtain competent testimony regarding prejudicial nature

- Objective standard

NOTE: Ct must not allow inquiry into deliberative process.

3) Ct determines scope of new trial

6. Polling the Jury, see CV 19, Sec. 5.C.

7. Communication After Trial

A. Statement by Ct discharging jury

I wish to take this opportunity to express my thanks and appreciation to you for the service rendered

WIS JI-CV 197

Your service in this case is completed. Many jurors ask if they are allowed to discuss the case with others after receipt of the verdict. Because your role in the case is over, you are not prohibited from discussing the case with anyone. However, you should know that you do not have to discuss the case with anyone or answer any questions about it from anyone other than the court. This includes the parties, lawyers, the media, or anyone else

If you do decide to discuss the case with anyone, I would suggest you treat any discussion with a degree of solemnity such that whatever you do say, you would be willing to say in the presence of your fellow jurors or under oath here in open court in the presence of the parties. It is in the public interest that there be the utmost freedom of debate in the jury room and that jurors be permitted to express their views without fear of incurring the anger of any litigants or criticism of any person. Please respect the privacy of the views of your fellow jurors

Finally, should any of you have questions for the court before leaving today, please let the bailiff know before you leave the jury room. You may confer with me at any time before answering any questions asked by anyone

CV 14: OPENING STATEMENTS

1. Scope

A. Opening statements are made after jury is selected and sworn

SCR ch 71

1) Verbatim record must be made

2) Tells jury what case is about, including

a. Outline of evidence Atty intends to offer

Beavers v St
63 Wis. 2d 597 (1974)

b. Issues of fact expected to be raised

Eric L. Andrews et al.,
Wisconsin Trial Practice

§§ 4.4, 4.5 (State Bar of
Wis 4th ed 2019 & Supp)

B. Opening statement must be distinguished from argument that is made after evidence is in

Beavers v St
63 Wis. 2d 597 (1974)
Baker v St
69 Wis. 32 (1887)

C. Limited to what Atty expects to prove

1) Should not anticipate other side's defenses, unless evidence to be presented in case-in-chief negates the defense

Kink v Combs
28 Wis. 2d 65 (1965)

2) Assertions made need not be founded on direct evidence, provided they may be inferred from the evidence

Wells v Nat'l Indem Co
41 Wis. 2d 1 (1968)

D. Statutory right to open and close applies only to main or basic issues of case

1) Denial of right to open and close is not necessarily prejudicial error

2) Does not apply to issues between Defs

3) Ct may permit Attys for a party to divide issues on opening or closing arguments between themselves

§ 805.10
Waukesha Cty DSS v
CEW (In Int of CEW)
124 Wis. 2d 47 (1985)

Cannot limit to fewer than 2 per side

Waukesha Cty DSS v
CEW (In Int of CEW)
124 Wis. 2d 47 (1985)

4) GAL has right to make opening statement when acting as independent counsel for child

E. Prohibited practices

Theriot v Mercer
262 F2d 754
(5th Cir 1959)

1) Asserting as "fact" matters that cannot be proved

Shove v Shove
79 Wis. 497 (1891)

2) Referring to evidence that is inadmissible or incompetent

Sasse v St
68 Wis. 530 (1887)

3) Making statement calculated to prejudice jury

Kirkpatrick v Wells
51 SW2d 36 (Mo 1932)

4) Reading from pleadings

Beavers v St
63 Wis. 2d 597 (1974)
Carr v Boyd
229 P2d 659 (Co 1951)

5) Referring to statements of witnesses not to be called or contents of documents not to be introduced

Seefeld v
Chicago, M & St P Ry
67 Wis. 96 (1886)

6) Reading to jury amount awarded by condemnation comm'rs, in appeal from that award

2. Order of Statements

§ 805.10

A. Ordinarily plaintiff opens first

Marshall v
American Express
7 Wis. 1 (1858)

When action on counterclaim alone, party having burden of proof may proceed first

Eric L. Andrews et al.,
Wisconsin Trial Practice
§ 4.11 (State Bar of Wis
4th ed 2019 & Supp)

B. Def may follow plaintiff's statement or wait until plaintiff has rested

§ 805.10

C. Waiver of opening statement by either party does not preclude other party from making statement otherwise entitled to make

3. Control by Court

Hanes v Hermsen
205 Wis. 16 (1931)

A. Considerable discretion rests with Ct as to

§ 805.10

1) Length of time, provided time limitation is set before statements begin

Beavers v St
63 Wis. 2d 597 (1974)

2) Content, since statements should be brief and general rather than detailed

Fletcher v St
68 Wis. 2d 381, 388
(1975)

3) Whether to sequester witnesses during opening statement

Kink v Combs
28 Wis. 2d 65 (1965)

Davis v St
61 Wis. 2d 284 (1973)

B. Any objection must be made immediately

1) Followed by motion for mistrial out of presence of jury

St v Shears
68 Wis. 2d 217, 262
(1975)

2) Failure to move for mistrial constitutes waiver of that objection

Kaley v Van Ostrand
134 Wis. 443 (1908)

C. Motion to dismiss for no cause of action will not be granted on basis of plaintiff's opening statement

4. Use of Evidence or Visual Aids

A. Physical evidence should not be used in opening statements, unless stipulated to by parties

B. Chart, sketch, or diagram, if not objected to, may be used as visual aid

James v Heintz
165 Wis. 2d 572, 580
(Ct. App. 1991)

1) Ct has discretion to permit diagrams, charts, and graphs that are

a. Exhibits that will be introduced

b. Extemporized or prepared in advance of trial to summarize claim

CV 15: TRIAL EVIDENCE

1. Witnesses

A. Exclusion and separation of witnesses at trial. ***See*** **CV 10, Sec. 2**

B. Oath or affirmation

§ 906.03(1)

1) Witnesses shall be required by oath or affirmation to declare they will testify truthfully

§ 906.03(3)

Affirmation must be orally administered when witness has declared conscientious scruples against taking oath

§ 906.03(4)

2) Assent manifested by uplifted hand not mandatory

St v Hanson
149 Wis. 2d 474 (1989)

3) Young child need not be formally sworn

St v Hanson
149 Wis. 2d 474 (1989)

C. Competency of witnesses

§ 906.01

1) Every person is competent to be a witness, unless

§§ 885.16, 885.17,
repealed by
Wis Sup Ct Order 16-01,
2017 WI 13 (eff 7/1/17)

a. Excepted by "dead man's" statutes (However, dead man's statutes repealed effective July 1, 2017. Repeal applies to Ct proceedings commenced after July 1, 2017, and to any proceeding then pending, unless Ct determines application not feasible or would work injustice);

§ 906.06(1)

b. A member of the jury, or

§ 906.06(2)

- EXCEPT juror may testify as to extraneous prejudicial information or improper outside influence

§ 906.05

c. Presiding at trial as Judge

St v Dwyer
149 Wis. 2d 850 (1989)

2) Wis judges no longer empowered to review a witness's competency

a. Former questions of competency are now credibility issues

St v Hanna
163 Wis. 2d 193
(Ct. App. 1991)

b. Willingness or ability to speak the truth or communicate the truth also go to weight of witness's testimony

St v Gilbert
109 Wis. 2d 501 (1982)

c. Ct shall not quash a subpoena *ad testificandum* if witness found competent, unless excepted by statute

d. Child witnesses are competent by statute

SCR 71.01
Haugen v Haugen
82 Wis. 2d 411 (1978)

- Judge should make record if questioning of witness (such as child) occurs in chambers

D. Invocation of 5th Amendment Privilege by Witness

Grognet v Fox Valley Trucking Serv
45 Wis. 2d 235, 239 (1969)

1) 5th Amendment privilege may be invoked in civil action as protection against subsequent use in criminal actions but adverse inference may be drawn in civil case from invocation of privilege

SC Johnson & Son, Inc v Morris
2010 WI App 6
322 Wis. 2d 766

2) Withdrawal at trial of prior 5th Amendment invocation subject to balancing test:

a. Timing of request

b. Prejudice to opposing side

c. Question motivation of moving party

E. Opinions of lay witnesses

§ 907.01

1) Lay witnesses may testify to some opinions or inferences if not testifying as an expert

Mueller v Harry Kaufmann Motorcars, Inc
2015 WI App 8, ¶ 35
359 Wis. 2d 597

Owner of property may testify concerning the value of the owner's property, regardless of whether it is realty or personalty

2) Opinions or inferences must be rationally based on perceptions of witness, and either:

a. Helpful to understanding of testimony, or

b. Helpful to determination of factual issue

3) Except lay witness may not testify based on scientific, technical, or other specialized knowledge within scope of an expert witness under § 907.02(1). See **Sec. G.** below

F. General rules for experts

Netzel v St Sand & Gravel
51 Wis. 2d 1, 7 (1971)

1) Necessity of expert testimony decided on case-by-case basis

Racine Cty v Oracular Milwaukee, Inc
2010 WI 25, ¶ 28
323 Wis. 2d 682

When jury can draw own conclusions without aid of expert testimony, admission of such testimony may be not only unnecessary but improper

Parker v Wis Patients Comp Fund
2009 WI App 42, ¶ 28
317 Wis. 2d 460

2) Witness's qualification to provide expert testimony is preliminary question of fact for Judge to determine under § 901.04

Kerkman v Hintz
142 Wis. 2d 404 (1988)
St v Blair
164 Wis. 2d 64
(Ct. App. 1991)

3) Admissibility of expert testimony is within sound discretion of Ct

4) Certainty of testimony; probability or possibility

McGarrity v Welch Plumbing
104 Wis. 2d 414 (1981)
Pucci v Rausch
51 Wis. 2d 513, 519
(1971)

a. Most opinions should be stated to a reasonable professional (medical, engineering, etc.) probability

Kolpin v Pioneer Power & Light Co.
162 Wis. 2d 1, 37 (1991)

- No "magic words," however

Drexler v All Am Life & Cas Co
72 Wis. 2d 420, 432–33
(1976)

- Expert may use "liable" or "likely"

b. Mere possibility or conjecture is insufficient to state an opinion, but

- Expert can be cross-examined on possibilities, and

Roy v St Lukes Med Ctr
2007 WI App 218, ¶ 20
305 Wis. 2d 658

- Defense expert may testify to possibilities

Watson v St
64 Wis. 2d 264 (1974)
Rabata v Dohner
45 Wis. 2d 111 (1969)

5) Hypothetical questions

St v Pittman
174 Wis. 2d 255 (1933)

a. Not required

Novitske v St
92 Wis. 2d 302 (1979)

b. If used, must be based on assumptions that have support in evidence

St v Jensen
141 Wis. 2d 333, 340
(Ct. App. 1987), *aff'd*,
147 Wis. 2d 240 (1988)

c. Cautionary instruction will reduce risk that jury might regard expert's response to hypothetical question as evidence

Carney-Hayes v
NW Wis Home Care, Inc
2005 WI 118
284 Wis. 2d 56

6) Medical negligence experts

Glenn v Plante
2004 WI 24
269 Wis. 2d 575
Burnett v Alt
(In re Imposition of
Sanctions in Alt v Cline)
224 Wis. 2d 72 (1999)

a. Expert has qualified privilege not to testify, absent compelling circumstances. *See also* **CV 8, Secs. 7.B.** and **C.**

Carney-Hayes v
NW Wis Home Care, Inc
2005 WI 118
284 Wis. 2d 56

b. Medical witness must testify regarding own relevant conduct

Carney-Hayes v
NW Wis Home Care, Inc
2005 WI 118
284 Wis. 2d 56

c. Medical witness alleged to have caused injury may be required to testify about applicable standard of care

G. Admissibility of expert testimony

§ 907.03

1) Basis of opinion

Daubert v Merrell Dow
Pharm, Inc
113 S. Ct. 2786 (1993);
see also Kumho Tire Co
v Carmichael
119 S. Ct. 1167 (1999)
Gen Elec Co v Joiner
118 S. Ct. 512 (1997)

a. Federal approach to admissibility of expert testimony is often known as *Daubert* approach

St v Dobbs
2020 WI 64, ¶ 35
392 Wis. 2d 505

b. Because § 907.02(1) is identical to the language of Fed. R. Evid. 702, Trial Ct can look to federal interpretation of Fed. R. Evid. 702 for guidance

2) Basis for admissibility

§ 907.02(1)
St v Jones (In re Commitment of Jones)
2018 WI 44, ¶ 29
381 Wis. 2d 284
Seifert v Balink
2017 WI 2, ¶ 65
372 Wis. 2d 525
St v Hogan
2021 WI App 24, ¶ 18
397 Wis. 2d 171
pet for rev denied

a. Before admitting expert testimony, the Trial Ct must make the following determinations:

- Is the testimony about scientific, technical, or other specialized knowledge?
- Will the testimony assist the trier of fact to understand the evidence or determine a fact in issue?
- Is the witness qualified as an expert by knowledge, skill, training, or education?
- Is the testimony based on sufficient facts or data?
- Is the testimony the product of reliable principles and methods?
- Has the witness applied the principles and methods reliably to the facts in the case?

b. Assessing reliability

Seifert v Balink
2017 WI 2, ¶¶ 61–63
372 Wis. 2d 525
(citing favorably to Fed. R. Evid. 702 advisory cmte's note—2000)

- When assessing reliability, the Trial Ct must focus on the expert's reasoning and methodology rather than conclusions. To guide this analysis, the Trial Ct may consider the following non-exclusive list of factors:

— Whether the methodology can be or has been tested

— Whether the technique has been subjected to peer review or publication

— Known or potential rate of error of the methodology

— Existence and maintenance of standards controlling the technique's operation

St v Chitwood
2016 WI App 36, ¶ 50
369 Wis. 2d 132

Failure to follow entire protocol is issue best left for cross-examination

— Whether the methodology has been generally accepted in the professional community

— Whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying

— Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion

— Whether the expert has adequately accounted for obvious alternative explanations

— Whether the expert is being as careful as he/she would be in his/her regular professional work outside his/her paid litigation consulting

— Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give

Kumho Tire Co
v Carmichael
119 S. Ct. 1167, 1173–79
(1999)
Seifert v Balink
2017 WI 2, ¶¶ 70–81
372 Wis. 2d 525
St v Hogan
2021 WI App 24, ¶ 25
397 Wis. 2d 171
pet for rev denied

- Experience-based, non-scientific experts

— Trial Ct should focus on witness's personal knowledge or experience

— Witness must explain how experience leads to conclusion, why the experience is a sufficient basis for the opinion, and how the experience is reliably applied to the facts

— Objective is to ensure witness employs same level of intellectual rigor in courtroom as witness does when practicing in the field

— In some fields, experience is the predominant, if not sole, basis for reliable expert testimony

— Trial Ct should consider whether knowledge underlying witness's opinion has a reliable basis in the knowledge and experiences of the relevant discipline

Seifert v Balink
2017 WI 2, ¶¶ 64–65
372 Wis. 2d 525

- Trial Ct has broad latitude in deciding how to determine reliability; it need not consider any or all of these factors and may consider others

§ 901.04
Daubert v Merrell Dow Pharm, Inc
113 S. Ct. 2786, 2796
(1993)

c. Ct's decision on admissibility is made outside the presence of the jury, and Ct is not bound by rules of evidence except on privileges

St v Schaffhausen
No 2014AP2370-CR
2015 WL 4208686, ¶ 18
(Wis. Ct. App.
July 14, 2015)
(unpublished opinion
citable for persuasive
value per § 809.23(3)(b))

- Ct should not make a finding that a witness is qualified as an expert in the presence of the jury

Bourjaily v US
107 S. Ct. 2775, 2778–79
(1987)

d. Burden is on the proponent of the expert testimony to show by a preponderance that the testimony is admissible

Kumho Tire Co v Carmichael
119 S. Ct. 1167, 1176
(1999)
St v Hogan
2021 WI App 24, ¶ 22
397 Wis. 2d 171
pet for rev denied

e. Ct has broad latitude in determining reliability and fulfilling gatekeeping duties

Seifert v Balink
2017 WI 2, ¶ 75
372 Wis. 2d 525

- Expert's principles and methods are not reliable simply because the expert says so

§ 907.02(2)
Gen Elec Co v Joiner
118 S. Ct. 512, 519 (1997)

f. Expert testimony may not be admitted if the witness is entitled to receive compensation contingent on the outcome of the case (*See also* **CV 5, Sec. 13**, on *Daubert* motions)

§ 907.03

3) Underlying data (on which expert bases opinion or inference)

a. Need not be admissible in evidence (for opinion or inference to be admitted) if of type reasonably relied on by experts in the field

b. Otherwise-inadmissible facts or data may not be disclosed to jury unless Ct determines that probative value substantially outweighs prejudicial effect

St v Dobbs
2020 WI 64, ¶¶ 42–44
392 Wis. 2d 505

4) Exposition testimony

a. Exposition testimony is an educational lecture on general principles given by an expert witness

b. An expert can testify on general principles without explicitly applying those principles to, or even having knowledge of, the specific facts of a case

c. Required factors to be considered by Trial Ct before admitting exposition testimony:

- Whether the expert is qualified;
- Whether the testimony will address a subject matter on which the fact-finder can be assisted by an expert;
- Whether the testimony is reliable; and
- Whether the testimony will "fit" the facts of the case

d. "Fit" equates to expert testimony that is "sufficiently tied to the facts of the case" such that "it will aid the jury in resolving a factual dispute"

e. Testimony is helpful to the jury—or fits—"if it concerns a matter beyond the understanding of the average person, assists the jury in understanding the facts at issue, or puts the facts in context"

§ 885.38

H. Interpreters

§ 885.38

1) If Ct determines person has limited English proficiency, Ct may authorize use of qualified interpreter in accordance with § 885.38

§ 807.14

2) Ct may permit interpreter to act in any civil proceedings other than trial by telephone or live audiovisual means

§ 885.38(8)(a)1.

3) Cty advances funds for qualified interpreter

I. Examination of witnesses by Judge

§ 906.14(1), (2)
St v Wolter
85 Wis. 2d 353 (1978)
After Hour Welding
v Laneil Mgmt Co
105 Wis. 2d 130, 141
(Ct. App. 1981)
rev'd on other grounds
108 Wis. 2d 734 (1982)

1) Judge may call and interrogate witnesses

a. Judge may clarify questions and answers on important evidentiary matters that are ignored or inadequately covered

St v Asfoor
75 Wis. 2d 411 (1977)
St v Herrington
41 Wis. 2d 757, 767
(1969)

b. Judge's interrogation should be done with such care as to avoid betraying bias or prejudice and should not indicate to jury in any manner that Judge has formed an opinion as to facts, or that Judge is an advocate

§ 906.14(3)

2) Objections

a. Attys may make objections to Judge's calling or interrogation of witnesses at the time or at next opportunity when jury not present

b. Judge must make ruling on objection for record

§ 906.11

J. Examination of witnesses by Attys at trial

1) Ct shall exercise reasonable control over mode and order of interrogating witnesses

Hochgurtel v San Felippo
78 Wis. 2d 70 (1977)
Neider v Spoehr
41 Wis. 2d 610 (1969)

2) When more than one Atty represents same party, Ct has discretionary power

a. To control extent of manner of examination and cross-examination of witnesses, and

b. To deny right of examination and cross-examination of witnesses

3) Ct's discretion to be guided by

a. Circumstances of trial, and

b. Need to ensure that trial proceeds in an orderly and fair manner

Rausch v Buisse
33 Wis. 2d 154, 167
(1966)

4) Rebuttal testimony appropriate when defense injects new matter or new facts

a. Rule is flexible

b. Ct may in its discretion allow or receive such evidence

2. Depositions

A. Types

§ 804.05

1) Oral examination

§ 804.05(8)

May be by telephone

§ 804.06

2) Written questions

§ 885.40–.47

3) Videotape

B. Usage

§ 804.07(1)

1) Deposition may be used at motion hearing, interlocutory proceeding, or trial

§ 804.07(1)

2) Uses permitted

§ 804.07(1)(a)

a. For impeachment

§ 804.07(1)(b)

b. Adverse party may use deposition of party opponent for any purpose

§ 804.07(1)(c)
Martin v Richards
176 Wis. 2d 339, 354
(Ct. App. 1993)
aff'd in part,
rev'd in part
192 Wis. 2d 156 (1995)

c. Deposition of medical expert may be used by any party for any purpose; subsequent evidentiary deposition does not prevent use of prior discovery deposition

§ 804.07(1)(c)

d. Deposition of any witness, other than medical expert, may be used by any party for any purpose, provided Ct finds

- Witness is dead, or
- Witness is more than 30 miles from place of trial and will not timely return unless absence procured by offering party, or
- Witness out of State and will not timely return unless absence procured by offering party, or
- Witness unable to attend to testify because of age, illness, infirmity, or imprisonment, or
- Witness not able to be subpoenaed, or
- Exceptional circumstances make it desirable in interest of justice

3) Manner

§ 804.07(1)(d)
§ 901.07

a. Judge may require offering party to introduce additional parts of deposition

- Upon motion by adverse party, and
- If fairness requires

§ 901.07, *as amended by*
Wis Sup Ct Order
16-02A, 2017 WI 92
(eff. 1-1-2018)

- To provide context or prevent distortion (applicable to recorded and unrecorded statements)

§ 804.07(1)(d)

b. If only part of deposition offered in evidence by party, any party may introduce other parts

C. Objections

1) Objections to deposition testimony

§ 804.07(2)

a. Evidentiary rules apply to introduction of deposition testimony at trial as if witnesses were present and testifying

§ 804.07(3)(c)

b. Objections made at Ct hearing are timely, except

§ 804.07(3)(c)2.

- Objections to form of question or answer or objections of any kind that might have been cured if promptly presented at time of deposition

Strelecki v
Firemans Ins Co
88 Wis. 2d 464 (1979)

c. Under § 804.07(2) and (3)(c)1., hearsay objection not waived by failure to object at deposition

3. Use of Admissions and Interrogatories

§ 804.11

A. Admissions pursuant to § 804.11

§ 804.11(2)

1) May be used only in action in which admission obtained

2) May be used to conclusively prove

§ 804.11
Schmid v Olsen
111 Wis. 2d 228, 236
(1983)

a. Relevant statements or opinions of fact, even if dispositive of entire case

Bank of Two Rivers
v Zimmer
112 Wis. 2d 624 (1983)

b. Application of law to fact, including genuineness of documents

§ 804.11(2)
Schmid v Olsen
111 Wis. 2d 228, 239
(1983)

3) Ct may permit withdrawal or amendment of admission, when

Luckett v Bodner
2009 WI 68
318 Wis. 2d 423

a. Presentation of merits of action are subserved, and

b. Party obtaining admission does not show prejudice in maintaining action or defense after admission's withdrawal or amendment

B. Interrogatories

§ 804.08(2)(a)

1) Answers may be introduced at trial, unless contrary to rules of evidence

§ 804.08(2)(b)

2) Answers are admissible even if involve an opinion or contention that relates to fact or application of law to fact

4. Demonstrative Evidence and Experiments

Hernke v
Northern Ins Co
20 Wis. 2d 352 (1963)
James v Heintz
165 Wis. 2d 572, 580
(Ct. App. 1991)

A. Charts, diagrams, and models

1) Purpose of demonstrative evidence is to aid fact-finder by clarifying and explaining testimony

Campbell v
Menze Constr Co
166 N.W.2d 624, 626
(Mich. Ct. App. 1968)

a. Counsel encouraged to present case in way that will most clearly be understood by jury

§ 906.11(1)
St v Olson
217 Wis. 2d 730
(Ct. App. 1998)

b. Ct's discretion: During complex or voluminous testimony, highlights may be "summarized" on chart, which may be introduced in evidence as a pedagogical or teaching device summarizing and organizing admitted evidence

- If proper cautionary instruction given

B. Experiments

Bellart v Martell
28 Wis. 2d 686 (1965)
Hiller v Johnson
162 Wis. 19 (1916)

1) Purpose is to make testimony more meaningful to finder of fact

2) Standard for admissibility is judicial discretion

Ellsworth v Schelbrock
229 Wis. 2d 542, 564
(Ct. App. 1999)

aff'd on other grounds
2000 WI 63
235 Wis. 2d 678

Probative value of experiment must not be outweighed by prejudice, confusion, and waste of time

C. Photographic Evidence

§ 910.01(2)

1) Scope

Anderson v St
66 Wis. 2d 233 (1974)

a. Photographs

b. X-ray films

c. Motion pictures

d. Video surveillance tapes

§ 901.04(1), (3)(d)
Martz v Trecker
193 Wis. 2d 588
(Ct. App. 1995)
Ranft v Lyons
163 Wis. 2d 282
(Ct. App. 1991)

- Normally Atty work product and therefore not discoverable unless offered for use at trial. If offered, Trial Ct must give opposing parties ample opportunity to challenge materials outside jury's presence re: admissibility

St v Denton
2009 WI App 78
319 Wis. 2d 718

e. Videotaped reenactments and animations

Roy v St Lukes Med Ctr
2007 WI App 218
305 Wis. 2d 658
St v Peterson
222 Wis. 2d 449
(Ct. App. 1998)

- Ct must determine that it is "fair and accurate representation" "conducted under conditions reasonably similar to conditions existing at the actual event"

§ 904.03

- Even if foundation established, Ct may exclude if probative value outweighed by unfairly prejudicial effect

2) Use of original and duplicate

§ 910.02
§ 910.03

a. Original must be used except when duplicate admissible

b. Duplicate may be used to same extent as original, unless

- Genuine question raised to authenticity of original
- Unfair to admit duplicate in lieu of original

5. Exhibits

A. Jury room

Gibson v St
55 Wis. 2d 110 (1972)
Starke v Wolf
90 Wis. 434, 438 (1895)
Badger Bearing, Inc v Drives & Bearings
111 Wis. 2d 659, 669 (Ct. App. 1983)

1) Trial Judge has broad discretion to determine what exhibits will be permitted in jury room

Badger Bearing, Inc v Drives & Bearings
111 Wis. 2d 659, 669 (Ct. App. 1983)

a. Exhibits sent to jury room should be relevant to jury's deliberations

Shoemaker v Marc's Big Boy
51 Wis. 2d 611, 619 (1971)
Badger Bearing, Inc v Drives & Bearings
111 Wis. 2d 659, 669 (Ct. App. 1983)

b. Judge may properly withhold narrative exhibits that give undue emphasis to one part of evidence

State v Anderson
2006 WI 77, ¶ 27
291 Wis. 2d 673
overruled on other grounds by
St v Alexander
2013 WI 70
349 Wis. 2d 327

c. Factors Ct should consider:

- Will it help jury properly consider the case?
- Will exhibit unduly prejudice a party?
- Will exhibit be subject to improper use?

CV 16: MOTIONS AT CLOSE OF EVIDENCE

§ 805.14(3)

1. Motion to Dismiss at Close of Plaintiff's Evidence

A. Availability

Def may move for dismissal

B. Nature

Tests sufficiency of plaintiff's evidence

C. Entitlement

§ 805.14(1)
Beacon Bowl v
Wis Elec Power Co
176 Wis. 2d 740, 788
(1993)

1) Statutory test—After considering all credible evidence and reasonable inferences in light most favorable to party against whom motion made, Ct must be satisfied there is no credible evidence to sustain finding in favor of that party

§ 805.17(1)

a. Test differs for bench trial

b. See **CV 21** for bench trial

Ferraro v Koelsch
119 Wis. 2d 407
(Ct. App. 1984)
aff'd on other grounds
124 Wis. 2d 154 (1985)

2) "Incredible evidence" is evidence in conflict with the uniform course of nature or with fully established or conceded facts

Helmbrecht v
St Paul Ins Co
122 Wis. 2d 94 (1985)

3) Above standard applies to Trial Ct and Ct on appeal

St v Joerns Furniture Co
114 Wis. 2d 324
(Ct. App. 1983)

4) Motion to dismiss must be denied unless no jury could disagree on facts or inferences to be drawn and no credible evidence exists to support a verdict for plaintiff

Beacon Bowl v
Wis Elec Power Co
176 Wis. 2d 740, 788
(1993)
First Nat'l Bank v
Sheriff of Milwaukee Cty
34 Wis. 2d 535, 541
(1967)

5) When deciding a motion to dismiss at close of case, trial Ct should consider only proof by plaintiff when it rested its case

§ 805.14(4)

2. Motion at Close of All Evidence

A. Availability

Any party

B. Nature

1) Tests sufficiency of evidence, or

2) Requests Ct to find as a matter of law upon any claim or defense or upon any element or ground thereof

C. Entitlement—Same statutory test as Sec. 1.C. above

D. Case supplementation

Wis Natural Gas v Ford,
Bacon & David Constr
96 Wis. 2d 314, 338
(1980)
Nolden v Mutual Benefit
Life Ins Co
80 Wis. 2d 353, 358–59
(1977)

1) Not function of Ct to weigh evidence

2) Ct may not direct verdict unless

Millonig v Bakken
112 Wis. 2d 445, 450–51
(1983)
Wis Natural Gas v Ford,
Bacon & Davis Constr
96 Wis. 2d 314, 339
(1980)
Leen v Butler Co
177 Wis. 2d 150, 155
(Ct. App. 1993)

Evidence not in dispute or so clear and convincing as reasonably to permit unbiased and impartial minds to come to but one conclusion

Merco Distrib Corp v Com'l Police Alarm Co 84 Wis. 2d 455, 460–61 (1978)
Larson v Splett 267 Wis. 473 (1954)

3) Ct must accept evidence as true unless evidence is mere conjecture

Graves v Travelers Ins 66 Wis. 2d 124 (1974)

4) Ct should not direct verdict if evidence within jury's province to accept either of a witness's contradictory statements about material issue

5) Inferences

Beacon Bowl v Wis Elec Power Co 176 Wis. 2d 740, 788 (1993)
Christianson v Downs 90 Wis. 2d 332, 334–35 (1979)

a. Party against whom motion directed must be given all reasonable inferences

Wills v Regan 58 Wis. 2d 328 (1973)
Weber v Walters 268 Wis. 251 (1954)

b. If opposing inferences can be drawn, motion must be denied

Millonig v Bakken 112 Wis. 2d 445 (1983)

c. Even if the evidence adduced is undisputed, if it permits different or conflicting inferences, verdict should not be directed

City of Milwaukee v Bichel 35 Wis. 2d 66 (1967)
Foss v Town of Kronenwetter 87 Wis. 2d 91 (Ct. App. 1978)

6) Ct may direct verdict if all facts and circumstances as they appear in evidence permit but one conclusion or inference to be reached by reasonable person

3. Duty of Court

Village of Menomonee Falls v Michelson 104 Wis. 2d 137 (Ct. App. 1981)

A. Except in clearest of cases, Ct should withhold ruling on directed verdict and permit case to go to jury

B. Motion should not be argued in presence of jury

Cords v Anderson
80 Wis. 2d 525 (1977)
Makowski v Ehlenbach
11 Wis. 2d 38, 42 (1960)

C. Ct not entitled to substitute its judgment or impression for those determinations normally reserved to jury

§ 805.14(8)

D. Motion for directed verdict not granted is not waiver of trial by jury, even though all parties have moved for directed verdict

Abolishes rule that such constituted waiver of determination of case by jury

4. Effect of Granting Motion

§ 805.14(7)

A. Any dismissal operates as adjudication on merits, unless Ct otherwise specifies for good cause recited in order for dismissal

Leen v Butler Co
177 Wis. 2d 150, 155
(Ct. App. 1993)
James v Heintz
165 Wis. 2d 572, 577
(Ct. App. 1991)

B. Reviewing Ct gives substantial deference to Trial Ct's ruling on directed verdict and should not reverse grant of motion unless "clearly wrong"

5. Amending Pleadings to Conform to Proof

§ 802.09(2)
Meiers v Wang
192 Wis. 2d 115 (1995)

A. Ct has authority to amend pleadings even after testimony closed to conform to proof

1) If no objection, or

2) If opposing party given opportunity to submit additional proof

Zobel v Fenendael
127 Wis. 2d 382
(Ct. App. 1985)

CV 17: CLOSING ARGUMENT

1. Scope and Purpose

See Wis JI-Cv 110

A. Purpose of closing argument is to give Attys an opportunity to summarize to jury why it should draw favorable inferences from evidence

Affett v Milw &
Suburban Transp Corp
11 Wis. 2d 604 (1960)

B. Attys should be entitled to reasonable latitude in argument and in commenting on evidence

§ 805.10

C. Rebuttal limited to matters raised by any adverse party in argument

SCR 71.01

D. Verbatim record of closing argument must be made

2. Right to Open and Order of Argument

§ 805.10

A. Plaintiff entitled to open argument and give final rebuttal argument

Marshall v Amer Express
7 Wis. 1 (1858)

1) Order of argument is matter of practice within control of Ct with which Supreme Ct will not interfere, unless clearly erroneous exercise of discretion

Wells v Nat'l Indem Co
41 Wis. 2d 1 (1968)

2) When there are several Defs with issues between them, Ct determines order of argument

Def having affirmative burden may reply, but before plaintiff's closing

§ 805.10

B. Waiver of argument by either party shall not preclude adverse party from making any argument that party otherwise would have been entitled to make

Carmody v Kolocheski
181 Wis. 394 (1923)

C. When there is no contest of plaintiff's claim, but there is contest as to Def's counterclaim, side with affirmative burden may open and close

Waukesha Cty DSS v
CEW (In Int of CEW)
124 Wis. 2d 47, 70 (1985)

D. GAL has right to argue facts to jury at fact-finding stage

3. Control by Court

§ 805.10
TAT v REB
(Paternity of MJB)
144 Wis. 2d 638 (1988)

A. Ct may limit time for argument before argument is begun

§ 805.10

1) No more than two Attys on each side to sum up to jury, unless Ct otherwise orders

St v Lenarchick
74 Wis. 2d 425, 458
(1976)

2) Restriction on argument that deprives party of due process may warrant new trial

St v Lenarchick
74 Wis. 2d 425, 457
(1976)

B. Reversal based on Ct's control of argument will not be granted absent erroneous exercise of discretion that affected jury verdict

Caesar v Wegner
262 Wis. 429 (1952)

Reversible error for Judge to leave courtroom while argument underway, so Judge no longer in control of proceedings

Lehner v Chicago,
Milw, St Paul & Pac RR
204 Wis. 558 (1931)

C. Ct should promptly and forcefully rule on any objection to improper remark and immediately instruct jury to disregard the remark

St v Davidson
44 Wis. 2d 177 (1969)

1) However, no erroneous exercise of discretion when objection not made until conclusion of argument and Ct elects not to correct inaccurate statement so as not to unduly emphasize matter

Frion v Craig
274 Wis. 550 (1957)

2) Any objection must be addressed to Ct and not to opposing Atty

Basile v Fath
185 Wis. 646 (1925)
Hansen v
Crown Controls Corp
181 Wis. 2d 673, 693
(Ct. App. 1993),
vacated in part
185 Wis. 2d 714 (1994)

3) Any objection at argument must be made promptly so Ct can take immediate action

Peot v Ferraro
83 Wis. 2d 727 (1978)

4) Ct will not review improper argument as matter of right when objecting party did not move for mistrial before jury returned verdict

D. Content of argument to jury is matter within discretion of Ct

Fahrenberg v Tengel
96 Wis. 2d 211, 228
(1980)

1) Wide latitude is recognized in giving of arguments

Fields v Creek
21 Wis. 2d 562 (1963)

2) Difficult to lay down precise standards that will successfully separate fair from unfair argument

a. Not all colorful, forensic thrusts will be struck down, but there is a point when enthusiastic advocacy becomes appeal to prejudice

b. Ct has burden of ensuring fairness

Klein v St Farm Mut Auto Ins Co 19 Wis. 2d 507, 510–11 (1963)

3) On review, test for showing prejudice is less stringent when Trial Ct finds improper argument had prejudicial effect and warranted new trial

E. Improper arguments include

Affett v Milw & Suburban Transp Corp 11 Wis. 2d 604 (1960)
Fischer v Fischer 31 Wis. 2d 293 (1966)

1) Use of mathematical formula to compute personal-injury damages, especially per diem, per week, per month

Suggestion of lump sum for pain and suffering is proper

Brown v Swineford 44 Wis. 282 (1878)
75A Am Jur 2d *Trial* § 506

2) Reference to matter not in evidence, unless it is matter of general knowledge clearly established by history, literature, or science

Kink v Combs 28 Wis. 2d 65 (1965)

Argument need not be founded on direct evidence if it may be inferred from evidence

3) Reading of legal opinions or from treatises

Testimony of witnesses may be read

Rodriguez v Slattery 54 Wis. 2d 165 (1972)
Dostal v Millers Nat'l Ins Co 137 Wis. 2d 242, 260 (Ct. App. 1987)

4) Use of "golden rule" argument, i.e., asking juror to put self in shoes of plaintiff and decide what juror would want for particular injury to self or child

a. Whether to grant a mistrial depends on

- Nature of the case
- Emphasis on "golden rule"
- Relation to entire argument
- Likely impact on jury

Klein v
State Farm Mut Ins
19 Wis. 2d 507 (1963)

Mertens v Lundquist
15 Wis. 2d 540 (1962)

Kobelinski v Milw &
Suburban Transp Corp
56 Wis. 2d 504 (1972)
Pecor v Home Indem Co
234 Wis. 407 (1940)

Hanley v
Milw Elec Ry & Light
220 Wis. 281 (1936)

State v Bjerkaas
163 Wis. 2d 949
(Ct. App. 1991)

Lievrow v Roth
157 Wis. 2d 332 (1990)

Pieper v
Neuendorf Transp Co
87 Wis. 2d 284, 292
(1979)

Allsop Venture Partners
III v Murphy Desmond
SC, 2023 WI 43, ¶ 32
407 Wis. 2d 387

5) Stating that damage awards in other states are higher than in Wis

6) Referring to financial worth of one of parties when no claim for punitive damages

7) Informing jury of effect of answer to particular question

8) Referring to Def as "soulless, heartless corporation"

9) Arguing jury nullification

10) Luring jurors into belief that verdict agreed to by fewer than five-sixths can be received

11) Informing jury plaintiff would have to share award with worker's compensation carrier

12) Referring to settlements reached with other Defs as proof of those Defs' liability

CV 18: JURY INSTRUCTIONS

1. Preliminary Instructions

§ 805.13(1), (2)(b)

A. Judge may give preliminary instructions, which may again be given in charge at close of evidence

Keplin v
Hardware Mut Cas Co
24 Wis. 2d 319, 327–28
(1964)

1) Preliminary instructions discretionary

Except when note-taking permitted

2) Preliminary instructions must not anticipate evidence to be introduced

Wis JI-Cv 50

3) Pattern preliminary instruction

Committee Comment

4) Other instructions that may be given as preliminary instructions

a. Judge's demeanor

b. Credibility of witnesses; weight of evidence

c. Closing

d. Supplemental instruction when jury unable to agree

e. Questions permitted or not permitted

f. Transcript not available for deliberations

g. Burden of proof

B. If preliminary instructions to be given, should be done after jury selected and before opening statements

1) Attys must be present

St v Kuntz
160 Wis. 2d 722 (1991)

2) Preliminary instructions shall be disclosed to parties before being given so parties can object

2. Curative Instructions

1 Robert E Larsen,
Navigating the Federal
Trial §§ 2:30–2:32 (2020);
see also § 805.13(4)
SCR 73.02(1)(c), (3)

A. A curative instruction is one that is designed to correct an error

1) It is usually given at a party's request after there has been a sustained objection

Seifert v Balink
2015 WI App 59, ¶ 44
364 Wis. 2d 692, *aff'd*
2017 WI 2, ¶¶ 147–157,
372 Wis. 2d 525

2) A Trial Judge may give such an instruction sua sponte to lessen or eliminate the effect of the error

3) A curative instruction may be given at any stage of a proceeding and to correct virtually any kind of error made at trial

4) A curative instruction is usually given immediately upon an objection being sustained, although it may be waived or reserved and given at the end of the trial

5) Before giving a curative instruction, the preferred practice is to seek input from the parties

US v Prieto
549 F3d 513, 520
(7th Cir 2008)

6) A party may choose to forgo a Trial Judge's offer to give a curative instruction for reasons that to do so would emphasize or reinforce the prejudicial remark or material in the jurors' minds

B. A Judge must instruct jury on specific case-related instructions as soon as considered necessary

Genova v St
91 Wis. 2d 595, 622
(Ct. App. 1979)

1) Ct has responsibility and discretion to formulate curative instructions to reduce risk jury will be influenced by some trial error

Andrews v Chicago, Milw
& St Paul Ry
96 Wis. 348, 377 (1897)

2) If improper evidence or remarks, then Ct should immediately, if requested, direct jury to disregard

See Leiner v Kohl
261 Wis. 159 (1952)

3) Error in an instruction may be cured by other instructions

C. Presumption that curative instruction erases any prejudice

St v Sigarroa
2004 WI App 16, ¶ 24
269 Wis. 2d 234

1) Ct may conclude that a curative instruction erases any possible prejudice unless the record supports conclusion that jury disregarded admonition

St v Delgado
2002 WI App 38, ¶ 17
250 Wis. 2d 689

2) Presumption is that juries follow jury instructions

Laconte v
City of Kenosha
149 Wis. 343 (1912)

3) Error in admitting evidence may be rendered harmless by an instruction directing jury not to consider it

St v Medrano
84 Wis. 2d 11, 25 (1978)
Andrews v Chicago, Milw
& St Paul Ry
96 Wis. 348, 377 (1897)

4) Prejudicial effect cured by Ct's immediate instruction to jury to disregard the testimony in its entirety

D. Improper remarks or evidence incapable of correction by curative instruction may require mistrial

Wagner v American Family Mut Ins Co
65 Wis. 2d 243, 250
(1974)

1) If improper remarks are incapable of correction by curative instruction, a new trial is required without prejudicial remarks or evidence

2) *See* **CV 10, Motions Relating to Trial, Sec. 3.C.—Mistrial**

St v Moeck
2005 WI 57, ¶¶ 71–72
280 Wis. 2d 277

3) Ct should always look to alternatives short of declaring a mistrial, including use of curative instruction

4) Some trial errors are so prejudicial that they cannot be corrected by a curative instruction. *See* **CV 10, Motions Relating to Trial, Sec. 3—Mistrial**; *see also infra* **Secs. 6.A., B., C., D.—Responsibility of Ct**

3. Instruction Conference

§ 805.13(3)

A. Judge must hold instruction conference in absence of jury at close of evidence and before arguments to jury

§ 805.13(3)

B. At conference, Judge must inform Attys on the record of proposed action on

1) Motions for instructions

2) Which instructions will be submitted to jury

§ 805.13(3)
Dakter v Cavallino
2014 WI App 112, ¶¶ 77–78, 358 Wis. 2d 434,
aff'd,
2015 WI 67
363 Wis. 2d 738

C. Failure to object at conference on the record constitutes a waiver of any error in proposed instructions

Committee Comment

"Although cases sometimes use the words 'forfeiture' and 'waiver' interchangeably, the two words embody different legal concepts. 'Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.'" *St v Ndina*, 2009 WI 21, ¶ 29, 315 Wis. 2d 653 (quoting *US v Olano*, 113 S. Ct. 1770, 1777 (1993)).

Best Price Plumbing, Inc v Erie Ins Exch
2012 WI 44, ¶ 37

340 Wis. 2d 307
Leahy v
Kenosha Mem'l Hosp
118 Wis. 2d 441
(Ct. App. 1984)

1) Objection must be stated with particularity (so Ct can correct alleged error)

Indus Risk Insurers v
Am Eng'g Testing. Inc
2009 WI App 62
318 Wis. 2d 148
Douglas v Dewey
154 Wis. 2d 451
(Ct. App. 1990)

2) Simply submitting instructions that are rejected is not enough to preserve objection

D. Party's written motion may refer to standard Wis JI-Cv instructions

1) But if pattern instruction contains alternative clauses or blanks, motion requesting use of such standard instruction is fatally imprecise, unless motion specifies

a. Clause to be used

b. Word or words to be inserted in blanks

c. Any other ambiguity or incompleteness cured

4. Final Instructions

§ 805.13(4)

A. Ct may instruct jury either before or after closing arguments

1) Some prefer to instruct before closing arguments to avoid "The Judge will instruct you that…."

2) Some prefer to instruct after argument so that the instructions are fresh in the jury's mind

3) Attys must be present

St v Kuntz
160 Wis. 2d 722,
735 (1991)

4) Must inform counsel of changes Ct makes to jury instructions following instructions conference

St v Harvey
2022 WI App 60, ¶ 57
405 Wis. 2d 332

a. If Trial Ct fails to inform parties of changes after conference, reversal required only if changes are prejudicial

§ 805.13(5)

5. Reinstruction

Hareng v Blanke
90 Wis. 2d 158 (1979)

A. Jury may request further instruction after final instructions and during deliberation

§ 805.13(5)
Hareng v Blanke
90 Wis. 2d 158 (1979)

In such case, Ct has discretion concerning necessity, form, and extent of reinstruction

B. Before reinstructing, Judge must see that Attys are notified and present, unless

Atty has on the record waived right to be present in event jury is reinstructed

6. Responsibility of Ct

Eichman v Buchheit
128 Wis. 385 (1906)

A. To clearly and concisely state to jury issues and applicable principles of law necessary to correctly resolve the lawsuit

Claybrooks v St
50 Wis. 2d 79 (1971)
Reuling v Chicago, St Paul, Mpls & Omaha Ry
257 Wis. 485 (1950)

B. To give correct instructions notwithstanding absence of request from or objections by Attys

DL v Huebner
110 Wis. 2d 581 (1983)
St v Clausen
105 Wis. 2d 231, 241
(1982)

C. There will be times when model instruction not available or appropriate

1) In those cases, Judge must draft or tailor pattern instruction to fit special circumstances of particular fact situation

Root v Saul
2006 WI App 106
293 Wis. 2d 364

2) Trial court may use appropriate criminal instructions as model instructions in civil cases

Douglas-Hanson Co v BF Goodrich Co
229 Wis. 2d 132, 154
(Ct. App. 1999) *aff'd by equally divided Ct*
2000 WI 22
233 Wis. 2d 276

D. Trial Cts have wide discretion in deciding what instructions will be given, as long as they fully and fairly inform the jury of the principles of law applicable to the particular case

Green v Smith & Nephew
AHP, Inc
2000 WI App 192, ¶ 15
238 Wis. 2d 477, *aff'd*
2001 WI 109
245 Wis. 2d 772

1) Trial Ct's instructions must be considered as a whole

Stoppleworth v
Refuse Hideaway
200 Wis. 2d 512 (1996)
Est of Burgess
v Peterson
196 Wis. 2d 55
(Ct. App. 1995)

E. Usually reversible error to inform jury, either directly or impliedly of the ultimate effects of its answer

7. Responsibility of Attys

A. Request

§ 805.13(3)

1) Either Atty may file written motions requesting Ct to instruct jury on the law

Time for this should be in scheduling order

2) Good practice to require requests for non-Wis JI-Cv instructions to be in writing in form desired to be given

B. Objections

§ 805.13(3)
DL Anderson's Lakeside
Leisure Co v Anderson
2008 WI 126, ¶ 39
314 Wis. 2d 560

1) Failure at instruction conference to object to Ct's proposed instruction constitutes waiver of error

Howard v State Farm
Mut Auto Liab Ins Co
70 Wis. 2d 985 (1975)

2) Failure to object to final form of instruction constitutes waiver, except in "extraordinary situations"

Micke v
Jack Walters & Sons
70 Wis. 2d 388 (1975)

3) Failure to give limiting instruction concerning specific evidence is waived, absent request

Fischer v Ganju
168 Wis. 2d 834, 849
(1992)

4) If party objects to one part of instruction, reviewing Ct must review entire instruction to determine whether error prejudicial

8. Form, Scope, and Order of Instruction

Minton v
Farmers Mut Auto Ins Co
256 Wis. 556 (1950)

A. Should be short, concise, and directly to point

B. Should be complete, clear, and direct statement of law applicable to case free from obscurity or argumentation

Lutz v Shelby Mut Ins Co
70 Wis. 2d 743 (1975)
Hoeft v Friedel
70 Wis. 2d 1022 (1975)

C. Error to refuse to instruct on material issue raised by evidence or to give instruction on issue that has no support in evidence

Kink v Combs
28 Wis. 2d 65 (1965)

1) Instructions must be germane to issues framed in light of evidence

Carlson v Drews of
Hales Corners, Inc
48 Wis. 2d 408 (1970)

a. Pattern instruction must be tailored to be meaningful under circumstances

Anderson v
Alfa-Laval Agri, Inc
209 Wis. 2d 337
(Ct. App. 1997)

- To avoid prejudice

Vogel v Grant Lafayette
Elec Coop
201 Wis. 2d 416 (1996)

- To conform to the facts

Aetna Cas & Sur Co
v Osborne-McMillan
Elevator
35 Wis. 2d 517 (1967)

2) Improper for Judge to give undue prominence to contention of one party without equal prominence to other

Downey v Bradley Ctr
188 Wis. 2d 435
(Ct. App. 1994)
Peplinski v
Fobe's Roofing
186 Wis. 2d 308
(Ct. App. 1994)
aff'd, 193 Wis. 2d 6
(1995)

D. Standard of review is erroneous exercise of discretion not de novo review

Smith v Goshaw
2019 WI App 23, ¶¶ 13,
19, 387 Wis. 2d 620

1) An appellate Ct will reverse and order a new trial upon a finding that

a. A challenged jury instruction probably and not merely possibly misled the jury; or

b. The meaning communicated by the instruction as a whole was an incorrect statement of the law

9. Sending Jury Instructions to Jury Room

§ 805.13(4)
§ 345.43(5)
§ 799.21(4)

A. Judge to provide jury with complete set of written instructions providing "substantive" law to be applied and applicable burden of proof (except in traffic regulation cases and small claims actions)

1) Legislature shares with Ct the power to regulate practice and procedure

EB v St (In re EB)
111 Wis. 2d 175 (1983)

a. Failure of Ct to submit set of written instructions does not require automatic reversal

St v Brown
118 Wis. 2d 377, 383
(Ct. App. 1984)

b. Failure to submit applicable instruction gives rise to harmless error analysis on review

EB v St (In re EB)
111 Wis. 2d 175 (1983)

2) Substantive law deals with law defining legal liabilities or rights pertinent to given fact situation

EB v St (In re EB)
111 Wis. 2d 175 (1983)

3) Procedural law deals with rules governing forum in which legal liabilities and rights are determined

10. Admonition to Jury on Recess

A. "Jurors, I now caution you not to discuss this case with anyone, not even among yourselves, until this case is submitted to you for your final deliberations in the jury room, and you are then to discuss it only among yourselves in the jury room"

CV 19: VERDICTS

1. Forms of Verdict

A. General verdict

Boneck v Herman
247 Wis. 592 (1945)

1) Jury decides any or all issues in favor of either plaintiff or Def

2) Rarely used in civil cases

§ 805.12

B. Special verdict

Boneck v Herman
247 Wis. 592 (1945)

1) Jury finds facts only, leaving judgment to Ct

§ 805.12
60 Marq L Rev 201
(1977)

Controverted issues of ultimate fact submitted to jury in form of one or more written questions

§ 805.12(1)—Judicial
Council Note, 1974

2) Special verdict is rule, not exception

C. Formulation of special verdict

Gumz v
N States Power Co
2007 WI 135, ¶ 23,
305 Wis. 2d 263
Schulz v St Mary's Hosp
81 Wis. 2d 638, 654–55
(1978)

1) In general, formulation of special verdict is in Ct's discretion

§ 805.12(1)
Hannemann v Boyson
2005 WI 94
282 Wis. 2d 664

2) Verdict defective if it does not cover material issues of ultimate fact

Gumz v
N States Power Co
2007 WI 135, ¶¶ 46–49
305 Wis. 2d 263
Hannemann v Boyson
2005 WI 94
282 Wis. 2d 664

3) Material issues should be inquired about separately

Lagerstrom v
Myrtle Werth Hosp–Mayo
Health Sys
2005 WI 124, ¶ 97
285 Wis. 2d 1

4) Jury should not be asked to determine issues already established by uncontradicted proof, failure of proof, or stipulation

§ 805.13(3)

5) Conference on verdict required

Hansen v Texas Roadhouse, Inc
2013 WI App 2, ¶ 24
345 Wis. 2d 669

a. Special verdicts must correspond to the causes of action pleaded in the complaint and the proof presented at trial

Roach v Keane
73 Wis. 2d 524 (1976)
Martin v Richards
176 Wis. 2d 339, 352
(Ct. App. 1993)
aff'd in part, rev'd in part
192 Wis. 2d 156 (1995)

b. Attys have duty to participate in forming verdict or risk waiver of right to object

Wright v Mercy Hosp
206 Wis. 2d 449
(Ct. App. 1996)

c. Failure to object to form of verdict at conference on the record constitutes waiver

Indus Risk Insurers v Am Eng'g Testing, Inc
2009 WI App 62, ¶ 47
318 Wis. 2d 148

- Pretrial submission not sufficient to preserve objection

St v Duychak
133 Wis. 2d 307
(Ct. App. 1986)

6) Use of "and/or" in special verdicts is not desirable

2. Verdicts in Specific Cases

A. Negligence

Heldt v Nicholson Mfg Co
72 Wis. 2d 110 (1976)
Connar v West Shore Equip, Inc
68 Wis. 2d 42 (1975)
Pierringer v Hoger
21 Wis. 2d 182 (1963)
Zintek v Perchik
163 Wis. 2d 439, 454–55
(Ct. App. 1991)
60 Marq L Rev 91 (1976)

1) Ct must submit questions of causal negligence and comparison for all who may have contributed to the tortious event, including nonparties

a. Includes released party or party excluded from liability by operation of law

B. Medical malpractice

Shier v Freedman
58 Wis. 2d 269 (1973)
Trogun v Fruchtman
58 Wis. 2d 569 (1973)
Wis JI-Cv 1023
Wis JI-Cv 1023.2

1) Questions inquiring about physician's or surgeon's liability and operative procedures or care and treatment (or diagnosis) of patient and failure to inform patient of risks involved are submitted on negligence theory and form, not as battery

Hannemann v Boyson
2005 WI 94
282 Wis. 2d 664
(chiropractic malpractice)
Scaria v St Paul Fire &
Marine Ins Co
68 Wis. 2d 1 (1975)

2) Duties of performing services and providing informed consent are measured by different standards and should be stated separately

Fischer v Ganju
168 Wis. 2d 834 (1992)
Ehlinger v Sipes
(Ehlinger I)
148 Wis. 2d 260
(Ct. App. 1988)
Ehlinger v Sipes
(Ehlinger II)
155 Wis. 2d 1 (1990)

3) Causation involving increased risk of harm discussed

Fiumefreddo v McLean
174 Wis. 2d 10
(Ct. App. 1993)

4) *Res ipsa* instruction should be given if

a. Layperson can determine based on common knowledge or expert testifies that results do not normally occur in absence of negligence

b. Agent or instrumentality causing harm was within exclusive control of Def, and

c. Evidence sufficient to remove causation question from realm of conjecture, but not so substantial it provides full and complete explanation

C. Informed consent

§ 446.08
§ 447.40
§ 448.30
§ 448.697
§ 449.25

Verdict applies same informed consent standard applicable to physicians to podiatrists, chiropractors, dentists, dental therapists, and optometrists

D. Statutory duties

Wurtzler v Miller
31 Wis. 2d 310 (1966)
Nelson v Hansen
10 Wis. 2d 107 (1960)
Krause v VFW
9 Wis. 2d 547 (1960)
Wis JI-Cv 3290
Wis JI-Cv 3290.1

In safe-place, products-liability, and dog-bite cases, when liability rests on failure to comply with statutory duty, special verdict should include term "negligence" to facilitate comparison of plaintiff's and Def's alleged conduct

E. Products liability

Howes v Deere & Co
71 Wis. 2d 268 (1976)
Fischer v Cleveland
Punch & Shear Works Co
91 Wis. 2d 85 (1979)

Ct must submit question on both negligence and strict liability when there is proof on both theories of recovery

3. 5/6 Rule

Wis Const art I, § 5
Zintek v Perchik
163 Wis. 2d 439, 465
(Ct. App. 1991)

A. The same 10 (5) jurors must agree on answer to every question necessary to sustain a judgment on the verdict, not all questions

Recommendation

1) If parties stipulate that a number of jurors different than 6 or 12 will deliberate, Ct should also have parties stipulate on the number of answering jurors that will satisfy 5/6 requirement

Giese v
Montgomery Ward
111 Wis. 2d 392 (1983)

2) Verdict must be reviewed on claim-by-claim basis

Scipior v Shea
252 Wis. 185, 190 (1948)

Dissents to one claim may be immaterial to another when the verdict is reviewed on a claim-by-claim basis

Nommensen v
Am Cont'l Ins Co
2000 WI App 230, ¶¶ 19–22, 239 Wis. 2d 129
aff'd on other grounds
2001 WI 112
246 Wis. 2d 132

3) Need not look to the "entire verdict"

4) Every juror has a duty and privilege to make own independent answer to any question on verdict

Kowalke v
Farmers Mut Auto Ins
3 Wis. 2d 389 (1958)

5) Two lines should be inserted at the bottom of verdict to record jurors' dissents in answer to specific questions

Kowalke v
Farmers Mut Auto Ins
3 Wis. 2d 389 (1958)

6) Additional space must be allowed to record additional dissents

Lievrouw v Roth
157 Wis. 2d 332
(Ct. App. 1990)

7) Improper for Atty to lure jurors into belief that verdict agreed to by fewer than 5/6 can be received

Johnston v Eschrich
263 Wis. 254 (1953)

B. If too many dissenters

§ 805.13(5)
Bensend v Harper
2 Wis. 2d 474 (1958)
Jackson v Reisinger & Co
219 Wis. 535 (1935)
Wis JI-Cv 180

1) Ct may direct jurors to reconsider their answer with proper reinstruction

a. Only two tools to reinstruct, generally

- Wis JI-Cv 180, the standard 5/6 instruction

- Wis JI-Cv 195, Supplemental instruction where jury unable to agree. This instruction may only be read once or Ct may find a coerced verdict

2) Ct may reinstruct jury, but reinstruction must clearly inform jurors that they are permitted to disagree

Krueger v Winters
37 Wis. 2d 204 (1967)

3) Waiver of portion of claimed damages may rectify

Vogt v Chicago, Milw,
St Paul & Pac RR
35 Wis. 2d 716 (1967)
Lorbecki v King
49 Wis. 2d 463 (1971)

4) May not be a problem if dissenter agrees with other jurors, "only more so"

Dissent may be disregarded when result thereof operates in favor of objecting party

Westfall v Kottke
110 Wis. 2d 86 (1983)
Britton v Hoyt
63 Wis. 2d 688 (1974)

5) May be cured when Ct determines that one of the questions to which a juror dissented should be answered as matter of law

4. Inconsistent or Perverse Verdict

Redepenning v Dore
56 Wis. 2d 129 (1972)
Imark Indus v
Arthur Young & Co
148 Wis. 2d 605, 623
(1989)

A. Inconsistent verdict

Kain v Bluemound E
Indus Park
2001 WI App 230, ¶ 40
248 Wis. 2d 172

1) Verdict is inconsistent when answers are logically repugnant to one another

Reuben v Koppen
2010 WI App 63, ¶ 13
324 Wis. 2d 758

2) Inconsistency exists when answers cannot be reconciled or cannot be reconciled without eliminating or altering an answer. No inconsistency exists when a jury could have made both of the findings claimed to be inconsistent

Giese v
Montgomery Ward Inc
111 Wis. 2d 392 (1983)
Johnson v Heintz
61 Wis. 2d 585 (1973)

3) Verdict is inconsistent unless same 10 (5) jurors agree on all questions necessary to support judgment on particular claims

Westfall v Kottke
110 Wis. 2d 86 (1983)

4) If Ct cannot instantly conclude that verdict is proper, appropriate for Ct to retire to chambers to consider whether verdict is consistent before accepting it

Westfall v Kottke
110 Wis. 2d 86 (1983)

5) If verdict is inconsistent

Seif v Turowski
49 Wis. 2d 15 (1970)

a. Ct should reinstruct jury and resubmit verdict to jury

- With directions on jury's duty to produce a verdict which conforms to instructions
- Counsel should be given an opportunity to make suggestions or objections

Westfall v Kottke
110 Wis. 2d 86 (1983)

b. Ct has limited discretion to amend verdict when

- Party injured by inconsistency waives a portion of its damage claim and
- Waiver does not result in change of prevailing party as found by jury

Westfall v Kottke
110 Wis. 2d 86 (1983)
Britton v Hoyt
63 Wis. 2d 688 (1974)

6) Ct can cure inconsistent verdict only if correct answers can be made as matter of law

Westfall v Kottke
110 Wis. 2d 86 (1983)

B. Perverse verdict

1) Verdict is perverse when verdict's face shows

a. Jury failed to follow instructions or

b. Jury allowed emotional, inflammatory, or immaterial considerations to affect its decision or

Lutz v Shelby
70 Wis. 2d 743 (1975)

c. Verdict reflects an obvious prejudgment with no attempt to be fair

Lutz v Shelby
70 Wis. 2d 743 (1975)

2) Excessive or inadequate damages not sufficient to label verdict perverse

Dostal v
Millers Nat'l Ins Co
137 Wis. 2d 242, 254
(Ct. App. 1987)

3) Not necessary to find jury acted dishonestly or with improper motive, but it must appear that considerations were ulterior to a reasonably fair application of the judgment to the evidence and instructions

Fahrenberg v Tengel
96 Wis. 2d 211, 224
(1980)
Redepenning v Dore
56 Wis. 2d 129 (1972)

4) Where excessive verdict is result of perversity, Ct must order new trial

Fouse v Persons
80 Wis. 2d 390 (1977)

5) Where jury's answer to one material question shows jury made answer perversely, Ct should set aside entire verdict unless it is satisfied that other answers were not affected by perversity

C. If inconsistent verdict not remedied by resubmission to jury and not properly subject to waiver of claim, new trial required

Westfall v Kottke
110 Wis. 2d 86 (1983)

D. Failure of party to assert inconsistency at return of verdict and request that verdict be resubmitted to jury does not constitute waiver of right to object to verdict on posttrial motions

E. If Ct grants posttrial motion based on claim of inconsistent verdict

1) Inconsistency cannot be rectified at that juncture

2) New trial required

Westfall v Kottke
110 Wis. 2d 86 (1983)

F. Ct may always reserve ruling on motion for directed verdict made before submission of verdict to jury and rule on motion following return of verdict

5. Receiving the Verdict

A. Verdict received in open Ct

Westfall v Kottke
110 Wis. 2d 86, 96 (1983)

B. Ct should examine verdict to determine whether it conforms to the 5/6 rule, that it is consistent and not perverse

1) If any of the above problems appear in the verdict

a. Ct should consider whether the problems can be dealt with without reconsideration of the verdict by the jury

b. If the problems cannot be dealt with by the Ct, the Ct should return verdict to jury for reconsideration with appropriate instructions

City of West Allis v WEPCO
2001 WI App 226, ¶¶ 27–34, 248 Wis. 2d 10

c. 5/6 rule objections can be raised for first time in motions after verdict

St v DuFrame
107 Wis. 2d 300
(Ct. App. 1982)
St v Reid
166 Wis. 2d 139, 144
(Ct. App. 1991)

2) If redeliberations result in hung jury, Ct can sua sponte declare mistrial

St v Knight
143 Wis. 2d 408, 416–18
(1988)

3) Once Ct accepts verdict, it cannot order jury to redeliberate

St v Reid
166 Wis. 2d 139
(Ct. App. 1991)

4) Ct has discretion not to accept tendered jury verdict and declare mistrial out of manifest necessity so as to rectify fraud on the Ct

5) If verdict can be accepted, it should be read by Ct or Clerk and received and filed

St v Ritchie
46 Wis. 2d 47 (1970)
Kosak v Boyce
185 Wis. 513 (1925)

6) All parties should be asked if they wish to poll the jury

Jury is polled by identifying individual jurors and asking each of them, "Is this and was this your verdict?"

St v Raye
2005 WI 68
281 Wis. 2d 339

C. If jury fails to affirm verdict on a poll, declare mistrial or return jury for further deliberation

Ford Motor Credit Co
v Amodt
29 Wis. 2d 441 (1966)
Frion v Craig
274 Wis. 550 (1957)
Boller v Cofrances
42 Wis. 2d 170 (1969)

D. Ct may only interrogate jurors to determine if irregularities occurred if charge is made on knowledge of one who is not a juror

§ 906.06(2)
St v Williquette
180 Wis. 2d 589
(Ct. App. 1993)
aff'd, 190 Wis. 2d 677
(1994)

Participating juror may not impeach verdict except as to extraneous prejudicial information brought to jury's attention

Walczakowski v
Milw Elec Ry & Light
157 Wis. 191 (1914)

E. Not legal duty of Ct to see that Attys are present at rendition of verdict

1) Better practice is to obtain location and phone at which Attys can be reached when jury returns

2) Ct should consider placing a specific time limit that it will allow for an Atty to return to courtroom following notification that verdict has been reached

6. Entry of Judgment

A. Judgment should not be entered until motions after verdict have been decided

1) Set date for motions after verdict immediately upon receipt and filing of verdict

Johnson v McDermott
38 Wis. 2d 185 (1968)

2) Ct may direct entry of judgment on verdict if motions not filed within specified time

7. Impeaching the Verdict

A. See Motions After Verdict, CV 20, Sec. 3.E.

CV 20: MOTIONS AFTER VERDICT

1. Motion for Judgment on the Verdict

§ 805.14(5)(a)

A. Motion for judgment on the verdict not required

B. If no motion after verdict filed within time specified in § 805.16, judgment entered on verdict

§ 805.16(3)

C. If motion after verdict timely filed, judgment on verdict entered upon denial of motion or expiration of 90 days

2. Postverdict Motions Challenging Verdict or Legal Effect of Verdict

A. Time requirements

1) Filing

§ 805.16(1)

a. Motions after verdict must be served and filed within 20 days after verdict rendered except

§ 805.16(1)

b. If Ct, by order, sets longer time, order must specify dates for filing motions, briefs, or other documents

Ahrens Cadillac-Oldsmobile v Belongia
151 Wis. 2d 763
(Ct. App. 1989)

c. If motions after verdict not filed within 20 days after verdict rendered and no extension sought within the 20 days, Ct lacks competency to hear motion(s)

- Oversight of not filing postverdict motions on time cannot be cured

Brookhouse v St Farm Mut Auto Ins Co
130 Wis. 2d 166
(Ct. App. 1986)

- "Excusable neglect" under § 801.15(2)(a) not available

Schmidt v Smith
162 Wis. 2d 363
(Ct. App. 1991)

- One party's timely motion after verdict may not imbue a Ct with authority to rule on another party's untimely motion

N Air Servs, Inc v Link
2011 WI 75, ¶¶ 53–58
336 Wis. 2d 1

- Timing requirements of § 805.16 apply to each phase's verdict in multi-phase trial

Gen Tel Co v Auto-Owners Ins Co
140 Wis. 2d 10
(Ct. App. 1987)

- Trial Ct's inherent power to grant a new trial in the interest of justice, on its own motion is subject to statutory time limits unless an equitable ground, such as fraud, exists for setting aside the order or judgment

2) Argument

§ 805.16(2)

a. Arguments must be heard not less than 10 nor more than 60 days after verdict rendered, unless time enlarged pursuant to motion under § 801.15(2)(a)

Hedtcke v Sentry Ins Co
109 Wis. 2d 461 (1982)

- Time may be enlarged when cause shown and upon just terms

- If motion made after time has expired, it shall not be granted unless Ct finds excusable neglect and if the interests of justice would be served by the enlargement of time

§ 801.15(2)(a)

b. Order must recite by its terms or by reference to an affidavit in the record, grounds for granting the motion

§ 805.14(5)(f)

c. Hearing may be by telephone or by live audiovisual means as prescribed in § 807.13

3) Order on motion

§ 801.15(2)(c)

a. Time for deciding motions after verdict under § 805.16(3) may not be enlarged

§ 805.16(3)
Watts v Watts
152 Wis. 2d 370, 377–78
(Ct. App. 1989)

b. If decision not made within 90 days after verdict rendered

Gegan v Backwinkel
141 Wis. 2d 893
(Ct. App. 1987)

- Motion deemed denied

- Judgment entered on verdict

§ 801.15(2)(c)

c. If Ct by order enlarged time for filing motions after verdict

§ 805.16(3)

- Requirement that Ct must decide the motion on the record or sign order deciding motion within 90 days after verdict rendered or motion deemed denied still applies

§ 805.16(4)

d. Motion for new trial based on newly discovered evidence must be made within one year after verdict

- Order granting or denying motion must be entered within 90 days after motion made or shall be deemed denied

Gegan v Backwinkel
141 Wis. 2d 893, 897–98
(Ct. App. 1987)

- Death or disability of presiding judge during statutory period does not change 90-day rule

Manly v St Farm Fire & Cas Co
139 Wis. 2d 249
(Ct. App. 1987)

e. Once Ct loses authority to set aside verdict by failure to take timely action

- Ct cannot achieve same result by vacating judgment under § 806.07(1)(h)

- Ct cannot set aside verdict through other means such as ordering a new trial in the interests of justice

§ 805.14(6)

f. If Ct grants motion after verdict that challenged sufficiency of the evidence, Ct must state on the record or in writing, with particularity, evidentiary defect underlying the order

§ 805.14(7)

g. Dismissal on merits unless Ct specifies otherwise for good cause

§ 805.14(5)(d)

B. Motion for directed verdict or dismissal

1) Availability

a. Party who made motion for directed verdict or dismissal on which Ct has not ruled may renew it after verdict

2) Nature

a. Tests sufficiency of evidence

§ 805.14(6)

b. Grounds and ruling must be stated with particularity

§ 805.14(1)

3) Entitlement

Weiss v
United Fire & Cas Co
197 Wis. 2d 365 (1995)

a. After considering all credible evidence and reasonable inferences in light most favorable to party against whom motion made, Ct must be satisfied there is no credible evidence to sustain finding in favor of that party

Foss v
Town of Kronenwetter
87 Wis. 2d 91
(Ct. App. 1978)

b. Test is same whether decision made before or after submission to jury

C. Motion for judgment notwithstanding verdict (JNOV)

1) Availability

§ 805.14(5)(b)

a. Party against whom a verdict has been rendered may move for JNOV

§ 805.14(5)(e)

b. Not necessary for a party to move for a directed verdict or dismissal before case is submitted to jury in order to move after verdict for JNOV

2) Nature

Logterman v Dawson
190 Wis. 2d 90, 102
(Ct. App. 1994)

a. Admits that findings of verdict are true but asserts that as a matter of law those facts are insufficient to constitute a cause of action

Kolpin v
Pioneer Power & Light
162 Wis. 2d 1 (1991)

b. Not proper motion to challenge sufficiency of evidence

Mgmt Computer Servs, Inc v Hawkins, Ash, Baptie & Co
224 Wis. 2d 312
(Ct. App. 1998)

c. JNOV is like granting a motion for a new trial: although postverdict action of Trial Ct "renders verdict a nullity," verdict may be reinstated and will provide basis for judgment if Trial Ct's postverdict action reversed

CV 16
Merrill Lynch, Pierce, Fenner & Smith, Inc v Boeck
120 Wis. 2d 591, 600
(Ct. App. 1984),
rev'd on other grounds,
127 Wis. 2d 127, 138
(1985)

d. Motion for JNOV presents the same determinations as those raised by a motion for directed verdict

3) Entitlement

Merrill Lynch v Boeck
120 Wis. 2d 591
(Ct. App. 1984)
rev'd on other grounds
127 Wis. 2d 127 (1985)

a. Motion granted when verdict proper but other reasons evident in record entitle moving party to judgment

Chevron Chem Co v Deloitte & Touche
176 Wis. 2d 935 (1993)

b. Entry of JNOV available as sanction for Atty misconduct that is repeated, flagrant, and intentional

D. Motion to change answer

1) Availability

§ 805.14(5)(c)

a. Any party may move Ct to change an answer in verdict on ground of insufficiency of evidence to sustain answer

§ 805.14(5)(e)

b. Party need not have moved for directed verdict or dismissal before case is submitted to jury in order to move after verdict to change an answer

Grice Eng'g v Szyjewski
2002 WI App 104
254 Wis. 2d 743

c. Answer in verdict can be changed if jury made "clerical error"

- In civil case, 5/6 of jurors must agree on corrected verdict

2) Nature

Kovalic v DEC Int'l, Inc
161 Wis. 2d 863
(Ct. App. 1991)

a. Challenges sufficiency of evidence to sustain answer

§ 805.14(6)

b. Grounds and ruling must be stated with particularity

3) Entitlement

§ 805.14(1)
Weiss v United Fire
& Cas Co
197 Wis. 2d 365, 388–89
(1995)
Nelson v Travelers Ins Co
80 Wis. 2d 272 (1977)
Kubichek v Kotecki
2011 WI App 32, ¶ 14
332 Wis. 2d 522

a. Evidence to be viewed in light most favorable to the verdict and the verdict will be affirmed if supported by any credible evidence or reasonable inference from the evidence

Lagerstrom v
Myrtle Werth Hosp–Mayo
Health Sys
2005 WI 124, ¶ 96
285 Wis. 2d 1
Danner v
Auto-Owners Ins
2001 WI 90, ¶¶ 72–79
245 Wis. 2d 49

b. Must "correct" damage award and change answer if requested change is only answer supported by the evidence

E. Motion for new trial

§ 805.15(1)

1) Available to any party based on

a. Interests of justice

b. Newly discovered evidence

c. Excessive or inadequate damages

d. Verdict contrary to law or weight of evidence

Hubbard v Mathis
53 Wis. 2d 306 (1972)

e. Errors in the trial but only if timely objection made before verdict returned

Shawver v Roberts Corp
90 Wis. 2d 672 (1979)
Chart v
General Motors Corp
80 Wis. 2d 91 (1977)

- However, if objection is to improper closing argument, motion for mistrial must also be made before jury verdict returned

Seifert v Balink
2017 WI 2, ¶ 139
372 Wis. 2d 525

- New trial based on improper statements of counsel is appropriate if it affirmatively appears that the remarks prejudiced the complaining party

2) Nature

Krolikowski v Chicago
& NW Transp Co
89 Wis. 2d 573 (1979)

a. May be granted even though findings are supported by credible evidence if contrary to great weight and clear preponderance of evidence

Sievert v Am Fam
Mut Ins Co
180 Wis. 2d 426, 433
(Ct. App. 1993),
aff'd on other grounds,
190 Wis. 2d 623 (1995)

b. Standard for permitting new trial when verdict is contrary to the weight of the evidence is less stringent than standard for changing jury's verdict under § 805.14. Verdicts can be against the great weight of the evidence even though supported by credible evidence

Priske v
General Motors Corp
89 Wis. 2d 642 (1979)

c. Trial Ct's ruling on motion for new trial is highly discretionary and will not be reversed in absence of showing of erroneous exercise of discretion

Larry v Commercial
Union Ins Co
88 Wis. 2d 728 (1979)

d. Discretionary power of Circuit Cts should be courageously and fearlessly exercised whenever Trial Judge is convinced that verdict is a miscarriage of justice

e. Reviewing Ct will look for reasons to sustain Trial Ct order for new trial

§ 805.15(2)

f. Every order granting new trial shall specify the grounds or be invalid and ineffective

3. Entitlement to New Trial: Case and Statutory Supplementation Based on Particular Grounds Asserted

§ 805.15(6)

A. Excessive or inadequate verdicts

1) Standard for review of damages

Johnson v Heintz
73 Wis. 2d 286 (1976)

a. Trial Ct must review evidence in light most favorable to claimed excessive verdict

Staskal v
Wausau Gen Ins Co
2005 WI App 216
287 Wis. 2d 511
Haase v R&P Indus
Chimney Repair Co
140 Wis. 2d 187
(Ct. App. 1987)

b. Jury award of damages to be upset only

- When so excessive as to indicate it resulted from passion, prejudice, or corruption, or
- When so excessive as to indicate it resulted from disregard of the evidence or applicable rules of law

Chitwood v AO Smith
Harvestore Prods
170 Wis. 2d 622
(Ct. App. 1992)

- When erroneous jury instruction given as to proper measure of damages

Zinda v
Louisiana–Pac Corp
140 Wis. 2d 277
(Ct. App. 1987)
aff'd in part, rev'd in part
149 Wis. 2d 913 (1989)

c. Verdict not to be upset merely because Ct would have awarded less. Ct should only assure that verdict approximates a sane estimate and does not shock judicial conscience

Redepenning v Dore
56 Wis. 2d 129, 134
(1972)

2) When award excessive because of perversity, Def entitled to a new trial

a. Award perverse when jury clearly refuses to follow Ct's direction on point of law or when verdict reflects inflammatory or immaterial considerations or obvious prejudgments

Redepenning v Dore
56 Wis. 2d 129, 134
(1972)
SC Johnson & Son, Inc
v Morris
2010 WI App 6, ¶ 38
322 Wis. 2d 766

b. Excessiveness alone does not establish perversity

§ 805.15(6)

3) When award excessive or inadequate not because of perversity, prejudice, or Ct error

§ 805.15(6)

a. Ct determines amount that is reasonable and orders new trial unless

- Within 10 days, party to whom option offered elects to accept judgment in changed amount

Burmek v Miller Brewing
12 Wis. 2d 405 (1961)

b. If party accepts reduced amount, party forfeits right to appeal damages

Farrell v John Deere Co
151 Wis. 2d 45
(Ct. App. 1989)

c. If party accepts increased damages, party forfeits right to appeal

- Litigant cannot seek a review of what he or she has accepted

Plesko v Milwaukee
19 Wis. 2d 210 (1963)

- Exception to this is when other party initiates an appeal, then cross appeal of remittitur is allowed

Staskal v
Wausau Gen Ins Co
2005 WI App 216, ¶ 38
287 Wis. 2d 511

d. Excessiveness in this context means award reflects injuries not proved or "rate of compensation beyond reason"

Fahrenberg v Tengel
96 Wis. 2d 211 (1980)

e. Punitive damages subject to Ct's revision in same manner as compensatory damages (see Punitive Damages, **CV 22, Sec. 1.C.**)

Markey v Hauck
73 Wis. 2d 165 (1976)

B. Verdict contrary to law or weight of evidence

1) Order rests in discretion of Trial Ct and will not be reversed unless clearly erroneous exercise of that discretion

2) Ct must set forth reasons for concluding jury's findings were inconsistent with evidence and justice has miscarried

3) Trial Ct cannot merely substitute its judgment for that of jury or find a different jury might have reached different result

4) Appellate Ct will look for reasons to sustain, not to reverse, Trial Ct

If only one of the several reasons advanced is sufficient, Trial Ct has not erroneously exercised its discretion

DeGroff v Schmude
71 Wis. 2d 554 (1976)

5) Trial Ct may order new trial in interest of justice under § 805.15 in contrast to new trial because of error whenever it determines jury's findings contrary to great weight and clear preponderance of evidence, even though those findings supported by credible evidence

Rule applies equally to findings of negligence, damages, causation and comparison of negligence

§ 805.15(3)

C. Newly discovered evidence

Mikaelian v Woyak
121 Wis. 2d 581
(Ct. App. 1984)

1) Ct must find all the following

a. Evidence has come to moving party's notice after trial

b. Failure to discover evidence earlier did not arise from lack of diligence

c. Evidence is material and not cumulative

Hollingsworth v
Amer Fin Corp
86 Wis. 2d 172 (1978)

d. New evidence would probably change the result

D. Interest of justice

Priske v
General Motors Corp
89 Wis. 2d 642 (1979)

1) Legislature vested discretion in granting new trials in interest of justice in Trial Cts; Trial Ct's rulings on motion for new trial highly discretionary and will not be reversed absent showing erroneous exercise of discretion

Giese v
Montgomery Ward Inc
111 Wis. 2d 392 (1983)

a. Because matter so highly discretionary, Trial Ct must state reasons in detail

Wachowiak v Spaight
207 Wis. 323 (1932)

b. Ct may grant new trial when, taking whole of evidence in connection with Judge's charge, it is affirmatively convinced that verdict contrary to interests of justice

Markowitz v Milwaukee
Elec Ry & Light
224 Wis. 347 (1937)

c. In determining whether new trial should be granted in interest of justice, Trial Ct should not treat as binding an extreme finding by jury moved by sympathy or extra legal cause

Lines v
City of Milwaukee
147 Wis. 546 (1911)

d. Trial Judge has duty to set aside verdict when Judge observes things during trial indicating jurors influenced by improper motives and verdict returned founded on passion and prejudice rather than upon law and evidence

Quick v Amer Legion
1960 Convention Corp
36 Wis. 2d 130 (1967)

e. Inclusion of misleading question in jury verdict that may lead to jury confusion sufficient basis for new trial

Barry v
Employers Mut Cas Co
2001 WI 101, ¶¶ 34–38
245 Wis. 2d 560

f. Inclusion of erroneous jury instruction may prevent a full, fair trial of issues and warrant new trial

Jolitz v Fintch
229 Wis. 256 (1938)

g. Jury's responsibility to weigh evidence and determine credibility does not prevent Ct from ordering new trial when Ct believes justice miscarried through bias or wrongly based judgment of jury in arriving at excessive damage award

Hanson v Binder
260 Wis. 464 (1952)

h. Because general conduct of trial is largely within discretion of presiding Judge, acts, mistakes, and incidental events that intervene and unfairly influence result may warrant, if not require, new trial in interest of justice

i. Trial Ct may grant new trial in interest of justice, because of improper questioning, when plaintiff's counsel asks additional question after previous objection sustained in same line of inquiry

St v Harp
161 Wis. 2d 773
(Ct. App. 1991)

j. Trial Ct may order new trial when real controversy not fully tried, regardless of type of error involved

- Ct need not find substantial likelihood of different result on retrial

Krolikowski v Chicago
& NW Transp Co
89 Wis. 2d 573 (1979)

2) New trial may be granted in interest of justice when jury's findings contrary to great weight and clear preponderance of evidence even though findings supported by credible evidence

DeGroff v Schmude
71 Wis. 2d 554 (1976)

a. Rule applies to jury findings of negligence, damages, causation, and comparison of negligence

McPhillips v Blomgren
30 Wis. 2d 134 (1966)

b. Trial Ct has wide discretion to order new trial in interest of justice if verdict against great weight and clear preponderance of evidence, even though evidence not so insufficient as to justify changing answers to special verdict questions

Bohlman v Nelson
5 Wis. 2d 77 (1958)

c. Trial Ct may order a new trial in interest of justice even though it cannot be held as matter of law that an answer is wrong

Mainz v Lund
18 Wis. 2d 633 (1963)

3) Award of inadequate damages not in itself grounds for ordering new trial when jury has answered other questions in verdict so as to find no liability on part of party charged with negligence

When finding no liability against great weight of evidence, added element of inadequate damages may have significance in determining whether new trial should be ordered in interest of justice

§ 906.06(2)

E. Impeachment of verdict because of jury misconduct

1) Strong policy reasons militate against impeachment of jury verdicts

St v Shillcutt
119 Wis. 2d 788 (1984)

a. Undermines finality of legal proceedings

b. Jurors would be subject to harassment, improper persuasions, and possible bribery

c. Need for secrecy in deliberations and a need not to disclose mental processes

Schumacher
v City of Milwaukee
209 Wis. 43, 48–49
(1932)

d. Litigant with notice of juror bias may not wait until after verdict to allege juror misconduct

Manke v
Physicians Ins Co
2006 WI App 50
289 Wis. 2d 750

2) Procedure

St v Marhal
172 Wis. 2d 491
(Ct. App. 1992)

a. Affidavit(s) admissible under § 906.06(2) must be filed to make preliminary showing of entitlement to hearing

After Hour Welding
v Laneil Mgmt Co
108 Wis. 2d 734 (1982)

b. To be admissible, proffered evidence must be competent under § 906.06(2)

St v Messelt
185 Wis. 2d 254 (1994)

- Evidence is competent if extraneous prejudicial information was improperly brought to the attention of one or more jurors

St v Marhal
172 Wis. 2d 491
(Ct. App. 1992)

- "'Extraneous' is both not of record and beyond juror's general knowledge and accumulated life experiences"

St v Shillcutt
119 Wis. 2d 788 (1984)

- Evidence is competent if any outside influence was improperly brought to bear upon any juror

- "An 'outside influence' is one imposed on the jury from outside by a third party"

Comment

- Based on above, fact that jurors misunderstood a verdict question, misunderstood the effect of their ruling, assented because of fatigue, or claim verdict was not their true belief, is not competent evidence

Anderson v Burnett Cty
207 Wis. 2d 587
(Ct. App. 1996)
St v Marhal
172 Wis. 2d 491
(Ct. App. 1992)

- Rule of testimonial incompetence of jurors must give way when shown that juror prejudice regarding race, national origin, religion, etc., is of such magnitude as to constitute an obvious default of justice or when fundamental fairness is violated

c. If affidavits not admissible because not competent, deny motion

d. If affidavits admissible, conduct hearing

After Hour Welding
v Laneil Mgmt Co
108 Wis. 2d 734 (1982)
St v Shillcutt
119 Wis. 2d 788 (1984)

3) Issues at hearing which Ct should consider and make findings regarding are

a. Whether statement was in fact made

b. Specifically when it was made

c. Circumstances under which it was made

d. Who made it

e. Which, if any, jurors were present

f. Whether jurors not present were informed of statement

g. Other relevant facts about statement which will assist Trial Ct to assess prospect of unfair prejudice

4) At conclusion of hearing Ct must determine whether party seeking to impeach verdict has cleared three hurdles

a. Proffered evidence must be competent under § 906.06(2) (based on same standards as for preliminary showing under **Sec. E.**2) above)

b. Evidence must be clear and convincing

Anderson v Burnett Cty
207 Wis. 2d 587
(Ct. App. 1996)

c. Evidence must show prejudice which is determined by

After Hour Welding
v Laneil Mgmt Co
108 Wis. 2d 734 (1982)

- Nature of the matter

Manke v
Physicians Ins Co
2006 WI App 50, ¶¶ 45–46, 289 Wis. 2d 750

- Probable effect on hypothetical average juror (objective standard)

St v Broomfield
223 Wis. 2d 465 (1999)
Johnson v Agoncillo
183 Wis. 2d 143
(Ct. App. 1994)

5) If allegation of juror misconduct pertains to alleged unrevealed bias, test is

a. Whether juror incorrectly or incompetently responded to material question on voir dire, and, if so

b. Whether it is more probable than not that under facts of case juror was biased against moving party

F. Specific instances of alleged juror misconduct

After Hour Welding
v Laneil Mgmt Co
108 Wis. 2d 734 (1982)

1) Juror referred to Atty's religion, Atty's defense of motorcycle gang, and Atty's involvement in suicide of a Judge

Case remanded to Trial Ct for hearing

St v Poh
116 Wis. 2d 510 (1984)

2) Juror referred to "other acts" evidence (not of record) concerning Def's supposed history of drunk driving

New trial mandated

St v Shillcutt
119 Wis. 2d 788 (1984)

3) Juror referred to Def's race

Statement lacked sufficient factual content so was not extraneous, thus not admissible under § 906.06(2)

Castaneda v Pederson
185 Wis. 2d 199 (1994)

4) Juror researched range of awards in medical malpractice cases

a. Wis Supreme Ct held information was extraneous because not of record and not part of juror's general knowledge and was improperly brought to attention of jury

b. Based on totality of circumstances, Wis Supreme Ct found information to be potentially prejudicial to both parties and, thus, a new trial was ordered on damages

Bittner v
Amer Honda Motor Co
181 Wis. 2d 93
(Ct. App. 1993)
rev'd on other grounds
194 Wis. 2d 122 (1995)

5) Juror took unauthorized view of accident scene and told other jurors opinion that accident couldn't have happened without plaintiff's contributory negligence

In seven-week trial with many experts, this one remark said to have little weight on hypothetical average juror

Hansen v
Crown Controls Corp
181 Wis. 2d 673
(Ct. App. 1993)
vacated in part
and remanded
185 Wis. 2d 714
(Ct. App. 1994)

6) Two jurors checked dictionary definitions of "defective," "defect," "fault," "neglect," "negligent," "injury," and "enhanced" in products-liability case and passed out list with meanings to other jurors

Some information not competent because not all jurors read it; other information not sufficient to show prejudice because nothing in the record showed what definitions of certain words were

St v Messelt
185 Wis. 2d 254 (1994)

7) In sexual-assault prosecution, four jurors knew of Def's prior sexual-assault convictions that were not admitted in evidence, or knew other allegedly extraneous matters. Wis Supreme Ct

a. Ruled that § 906.06(2) does not prevent jurors from testifying for purposes of determining whether a juror failed to reveal potentially prejudicial information during voir dire

b. Reaffirmed two-step test in situation in which juror failed to reveal information on voir dire

- That juror incorrectly or incompletely responded, and
- More probable than not that juror was biased against moving party

c. Interpreted § 906.06(2) not to require communication between jurors; i.e., the prejudice of only one juror is sufficient to invalidate verdict

d. Confirmed two-step analysis of *After Hour Welding*

- By clear, satisfactory, and convincing evidence were statements made?
- If made, does information constitute prejudice requiring reversal?

Manke v Physicians Ins Co
2006 WI App 50, ¶ 55
289 Wis. 2d 750

8) Juror brought in dictionary definition of "neglect" in medical malpractice case

Ct should not presume average juror would follow jury instruction rather than dictionary definition

Johnson v Agoncillo
183 Wis. 2d 143
(Ct. App. 1994)

9) In medical malpractice case, one juror failed to respond during voir dire to inquiry regarding opinions about effect of medical malpractice awards on health-care costs, and another juror failed to reveal that juror's father was a physician; during deliberations, a nurse said she feared a finding of negligence would come back and haunt her

Ct of Appeals affirmed Trial Ct finding that affidavits were not competent evidence

St v Marhal
172 Wis. 2d 491
(Ct. App. 1992)

10) Def's motion claimed one or more jurors, before deliberation, made a noose and stated Def "should hang"; one or more jurors indicated, before deliberation, that they would not listen to Def Atty because of his dialect (he was African American); one or more jurors said, before deliberation, that they should walk out because trial was "useless" and Def was guilty

Ct of Appeals found no basis for evidentiary hearing because Def did not make preliminary showing under § 906.06(2) since no affidavits were filed. If affidavits had been filed, allegations did not meet the "fundamental fairness offended" standard

CV 21: BENCH TRIAL

1. Jurisdiction

Wis Const art I, § 5

A. No constitutional right to jury in equitable actions

§ 805.01

1) Jury right extends to "all cases at law"

§ 805.02

a. May use advisory jury

§ 805.06(2)

b. May use referee if "some exceptional condition requires it"

2) Wis had constitutional right to trial to Ct

Wis Const art VII, § 2
Callanan v Judd
23 Wis. 343 (1868)

However, 1977 Ct reorganization amendment removed language "both as to matters of law and equity," which had formed basis for that right

Norwest Bank v Plourde
185 Wis. 2d 377
(Ct. App. 1994)
Green Spring Farms v
Spring Green Farms
172 Wis. 2d 28
(Ct. App. 1993)

3) Right to jury available for legal counterclaims, if

Def would be equitably estopped from asserting claims in a separate action

Harvot v Solo Cup Co
2009 WI 85, ¶¶ 46, 47,
63–64, 320 Wis. 2d 1

B. Right to jury trial for statutory cause of action

1) Unless constrained by constitution, legislature free to choose whether statutory cause of action subject to jury trial

2) When statute silent on right to jury, no jury trial required unless right preserved by Wis Constitution

3) Two-pronged test governs analysis whether right to jury trial preserved by Wis Constitution

a. Cause of action created by statute existed, was known, or was recognized at common law when Wis Constitution adopted in 1848, and

b. Action was regarded at law in 1848

Wis Const art I, § 5

C. Jury may be waived

§ 805.01(2)

1) Jury must be demanded at or before scheduling conference or pretrial conference (whichever is held first)

a. Demand may be made in writing or orally on the record

§ 805.01(3)

b. Demand may not be withdrawn without consent of parties

§ 805.01(3)

2) Failure to demand jury timely is waiver

§ 814.61(4)
Phelps v
Physicians Ins Co
2005 WI 85, ¶¶ 26–36
282 Wis. 2d 69

If fee not timely paid, jury trial waived, but Ct may grant jury trial anyway upon finding of cause and "excusable neglect"

§ 805.01(3)

3) Parties or Attys of record may consent to bench trial by written or oral stipulation

Tesky v Tesky
110 Wis. 2d 205, 212
(1983)

4) Waiver of jury trial does not survive a reversal and remand of case

Tesky v Tesky
110 Wis. 2d 205, 211
(1983)
St ex rel Sowle v Brittich
7 Wis. 2d 353, 359 (1959)

a. Waiver of jury trial is a procedural stipulation

Tesky v Tesky
110 Wis. 2d 205 (1983)
Welty v Heggy (Welty II)
145 Wis. 2d 828
(Ct. App. 1988)

b. Procedural stipulations always have reference to trial then pending, and not as stipulations, which shall bind at any future trial

§ 805.01(2)

D. Ct trial may be waived

2. Findings of Fact

§ 805.17(2)

A. Ct must find ultimate facts, which are not evidentiary facts, but those on which plaintiff's right of recovery necessarily depends

1) To aid Appellate Ct on review

2) To aid in applying doctrines of preclusion (estoppel and res judicata)

3) To aid Judge in carefully ascertaining facts

§ 805.17(2)

B. Findings of fact may be

1) In writing and filed before or concurrent with rendering judgment, or

2) Stated orally on the record at close of evidence, or

3) Set forth in an opinion or memorandum decision

Est of Olson v
La Crosse Tr Co
271 Wis. 199 (1955)

Portion of memorandum decision should be set apart and expressly designated as findings of fact

Czap v Czap
269 Wis. 557 (1955)

C. No findings of fact necessary when judgment entered in accordance with terms of stipulation settling litigation

§ 805.17(2)

D. Findings of fact must be made within 60 days after submission of cause

Galewski v Noe
266 Wis. 7 (1954)

1) Held to be directory only

Kamuchey v Trzesniewski
8 Wis. 2d 94 (1959)

2) But strict compliance with section of great help to litigants

E. Responsibility for correctness of findings of fact on Judge

Kamuchey v Trzesniewski
8 Wis. 2d 94 (1959)

1) If Judge and Atty prepare findings of fact, such proposed findings must be submitted to opposing Atty for objections before adoption by Ct

Sheedy v Popp (In re Est of Popp)
82 Wis. 2d 755 (1978)

2) Successor Judge who did not see or hear witnesses may not make findings of fact or render judgment in case tried to predecessor, unless

Cram v Bach
1 Wis. 2d 378 (1957)

a. Facts are stipulated or uncontroverted

Thomas-Bonner Co v Hooven, Owens & Rentschler Co
284 F 386 (6th Cir 1922)
48A CJS *Judges* §§ 175, 180 (2014)

b. By stipulation of parties (No Wis citation)

§ 805.17(1)

F. Motion to dismiss at close of plaintiff's case

§ 805.17(2)

1) If Def's motion to dismiss is granted, Ct shall make findings of fact and conclusions of law

Household Utilities, Inc v Andrews Co
71 Wis. 2d 17 (1976)

2) Test in determining motion to dismiss is different from test in jury case in that Judge, as finder of fact, need not view evidence in light most favorable to plaintiff

§ 805.17(1)
Household Utilities, Inc v Andrews Co
71 Wis. 2d 17 (1976)

3) Findings of fact made by Ct at close of plaintiff's case are final adjudication on merits, unless Ct otherwise specifies

§ 805.17(1)

4) If motion not granted, Def does not waive right to present evidence

3. Conclusions of Law

See 75B Am Jur 2d *Trial* § 1589 (2018)

A. Conclusions are drawn by Ct in exercise of its legal judgment from facts found by it

§ 805.17(2)

B. Must be stated separately from findings of fact

Specific conclusions of law that flow from findings on controverted issues of fact result in ultimate judgment

Hochgurtel v San Felippo 78 Wis. 2d 70 (1977)

C. On questions of law, appellate Ct not bound by interpretation, but due consideration given

§ 805.17(3)

4. Reconsideration, Amendment, and Additional Findings

A. Motion to reconsider must be made within 20 days after entry of judgment

§ 801.15(2)
Wainwright v Wainwright 176 Wis. 2d 246 (Ct. App. 1993)

1) Time may not be enlarged

§ 801.15(5)(a)
Bruns v Muniz 97 Wis. 2d 742, 746 (Ct. App. 1980)

2) Notice of entry of judgment by mail does not extend time by 3 days

B. Motion to reconsider may be made with motion for new trial

C. If motion not decided within 90 days after entry of judgment, deemed denied

D. Factors to consider

Koepsell's Olde Popcorn Wagons v Koepsell's Festival Popcorn Wagons 2004 WI App 129, ¶ 44, 275 Wis. 2d 397

1) Granting motion to reconsider must be based on newly discovered evidence or "manifest error" of law or fact

Metro Greyhound v Wis Racing Bd 157 Wis. 2d 678 (Ct. App. 1990)

2) Reconsideration may obviate need for appeal or aid appellate review by allowing Trial Ct to have its analysis

3) Section 805.17(3) provides procedural device to correct clerical errors in judgment (e.g., computation errors)

5.

Appeal

§ 805.17(4)

A. Sufficiency of evidence to support findings may be raised on appeal whether or not party has objected in Ct or moved for new trial

§ 805.17(2)

B. Findings of fact will not be set aside, unless clearly erroneous

Peterson v
Natural Resources Bd
94 Wis. 2d 587, 598
(1980)

Clearly erroneous has been equated with against the great weight and clear preponderance of evidence

§ 805.17(2)
Onderdonk v Keepman
(In re Est of Taylor)
81 Wis. 2d 687 (1978)

C. Judge is ultimate arbiter of credibility of witnesses

D. Inferences drawn by Judge from credible evidence binding on Appellate Ct

Orth v Ameritrade, Inc
187 Wis. 2d 162
(Ct. App. 1994)

E. Motion for reconsideration extends time for appeal

1) Time runs from denial of motion on the record or written order—whichever occurs first

CV 22: DAMAGES

1. Types of Damages Available

Musa v
Jefferson Cty Bank
2001 WI 2, ¶¶ 29, 30
240 Wis. 2d 327

A. Compensatory

1) Includes special and general damages

2) Awarded to provide money equal in value to value of loss sustained by plaintiff

Jones v Fisher
42 Wis. 2d 209 (1969)

3) Awarded to compensate injured party for actual damage and not to punish Def

Cutter Cranberry Co
v Oakdale Elec Coop
78 Wis. 2d 222 (1977)

4) Damages must be proven with reasonable certainty, but amount need not be mathematically precise

Alsteen v Wauleco, Inc
2011 WI App 105
335 Wis. 2d 473

5) Must have an actual injury—mere exposure not enough to state a personal-injury claim

a. Increased risk of cancer is not an actual injury

b. Need for medical monitoring is not an actual injury

B. Nominal

Polebitzke v
John Week Lumber Co
173 Wis. 509 (1921)

1) Awarded to plaintiff who establishes a substantive right to relief

Franz v Brennan
150 Wis. 2d 1 (1989)

Punitive damages ordinarily not recoverable in cases of vicarious liability

White v Benkowski
37 Wis. 2d 285, 289
(1967)

2) May be made when actual damages not sufficiently established or no actual loss

Fletcher v
Eagle River Mem'l Hosp
156 Wis. 2d 165 (1990)

3) May be sought to signify the establishment of a legal right

§ 895.043

C. Punitive

§ 895.043(6)

1) Statutory limitations:

a. Punitive damages received by plaintiff may not exceed twice the amount of any compensatory damages recovered by the plaintiff or $200,000, whichever is greater

Lorbiecki v
Pabst Brewing Co
2024 WI App 33,
¶¶ 66–86,
412 Wis. 2d 641
pet for rev filed

"Recovered" means the total amount of compensatory damages awarded by the jury, not the damages apportioned to the Def based on comparative fault

Comment

b. Section 895.043(6) refers to punitive damages received by plaintiff; does not explicitly appear to limit punitive damages received by Def on counterclaim

c. Section 895.043(6) does not apply to plaintiff seeking punitive damages from Def operating any of the following while under the influence of an intoxicant:

- Motor vehicle under § 340.01(35)
- Off-highway motorcycle under § 23.335(1)(q)
- Snowmobile under § 340.01(58a)
- All-terrain vehicle under § 340.01(2g)
- Utility terrain vehicle under § 23.33(1)(ng)
- Boat under § 30.50(2)

§ 895.043(5)

d. No joint and several liability for punitive damages

§ 895.043(2)

e. Sec. 895.043(2) does not apply to double or treble damages or to exemplary damages under

- Sec. 40.90—Elder Abuse
- Sec. 51.30—Mental Health Records
- Sec. 51.61—Patient's Rights
- Sec. 55.043—Adult-at-Risk Agency
- Sec. 103.96—Employment Regulations (Retaliation Against Migrant Workers)
- Sec. 134.93—Misc Trade Regulations (Commissions)
- Sec. 146.84—Misc Health Provisions (Health-Care Records)

- Sec. 153.76—Health-Care Information (Civil Liability)
- Sec. 252.14—Communicable Diseases (Discrimination Related to AIDS)
- Sec. 252.15—Communicable Diseases (Use of HIV Test)
- Sec. 610.70—Insurers (Disclosure of Personal Medical Information)
- Sec. 943.245—Worthless Checks
- Sec. 943.51—Retail Theft

§ 242.07(1)
C&A Invs v Kelly
2010 WI App 151
330 Wis. 2d 223

f. Punitive damages are not recoverable under the Uniform Voidable Transactions Law (formerly known as the Uniform Fraudulent Transfer Act)

Wangen v Ford Motor Co
97 Wis. 2d 260 (1980)

g. Punitive damages are not recoverable in a wrongful death action under § 895.04, but can be recovered in a survival action under § 895.01

Lund v Kokemoor
195 Wis. 2d 727, 734–37
(Ct. App. 1995)

h. Punitive damages are not recoverable in a medical malpractice action

2) Contract action punitive damages—**See Sec. 2.B.**3), *infra*

Wussow v Commercial Mechanisms, Inc
97 Wis. 2d 136 (1980)

3) Punitive damages awarded in addition to compensatory damages

Tucker v Marcus
142 Wis. 2d 425, 443
(1988)

a. Not available when there has been no "award of compensatory damages"

Jacque v Steenberg Homes
209 Wis. 2d 605 (1997)
Bauer v Murphy
191 Wis. 2d 517
(Ct. App. 1994)

- Exception: Nominal damages may support a punitive damages award for intentional trespass to land or slander per se

Musa v
Jefferson Cty Bank
2001 WI 2
240 Wis. 2d 327

b. Special damages alone, without any general damages, are sufficient to support award

Becker v
Auto Garage Door Co
156 Wis. 2d 409, 415
(Ct. App. 1990)

c. "Award" represents a recoverable remedy, is not itself a claim

Kimble v
Land Concepts Inc
2014 WI 21, ¶ 44
353 Wis. 2d 377

d. Punitive damages discretionary with jury. Not a matter of right

Anderson v Cont'l Ins Co
85 Wis. 2d 675, 694–96
(1978)

4) Intentional Infliction of Emotional Distress

a. Punitive damages available without any other damages alleged or proved

b. Unlike other intentional torts, which require substantial other damages to be proved

§ 895.043(3)

5) Punitive damages may be awarded when Def acts

a. Maliciously, or

b. In intentional disregard of plaintiff's rights

Berner Cheese Corp
v Krug
2008 WI 95
312 Wis. 2d 251
Wischer v Mitsubishi
Heavy Indus Am, Inc
2005 WI 26
279 Wis. 2d 4
Strenke v Hogner
2005 WI 25, ¶¶ 36, 38, 51
279 Wis. 2d 52

- Def acts with intentional disregard if he/she (1) acts with purpose to cause result or consequence, or (2) is aware that result or consequence is substantially certain to occur from Def's conduct

Cook v Public Storage,
Inc, 2008 WI App 155,
¶¶ 68–72
314 Wis. 2d 426

- For good analysis of sufficiency of evidence that result was substantially certain to occur from Def's conduct, see *Cook v Public Storage, Inc*

- Def's conduct need not be directed at specific plaintiff. Accordingly, to fall within § 895.043(3), Def's conduct must be (1) deliberate, (2) in actual disregard of another's rights, and (3) sufficiently aggravated to warrant punishment by punitive damages

Strenke v Hogner
2005 WI 25, ¶ 42
279 Wis. 2d 52
Hendrickson v Strapon
2008 WI App 145
314 Wis. 2d 225

- OWI—"not every drunk driving case will give rise to punitive damages"; proof of malicious intent or intentional disregard is required

Kimble v
Land Concepts, Inc
2014 WI 21, ¶ 43
353 Wis. 2d 377

c. Punitive damages are not intended to compensate the plaintiff, but are awarded to punish the wrongdoer and to deter the wrongdoer and others from similar conduct

§ 19.37(3)

6) Punitive damages may be awarded under public records law when authority or legal custodian has arbitrarily and capriciously denied or delayed response to a request or charged excessive fees

Brown v Maxey
124 Wis. 2d 426 (1985)

7) Not against public policy for insurer to pay

a. Coverage for punitive damages may be found in broad but unambiguous policy language with no specific exclusion

Davis v
Allied Processors, Inc
214 Wis. 2d 294
(Ct. App. 1997)

b. Primary coverage should first be exhausted by compensatory rather than punitive damages

- Even if this results in excess carrier avoiding payment because of punitive damage exclusion in excess policy

Wangen v Ford Motor Co
97 Wis. 2d 260 (1980)

8) Burden of proof of Def's conduct is clear and convincing

§ 895.043(4)

9) Plaintiff may not introduce evidence of wealth until prima facie case for punitive damages is established

Franz v Brennan
146 Wis. 2d 541
(Ct. App. 1988)

aff'd, 150 Wis. 2d 1
(1989)

a. However, when two or more Defs, evidence of wealth of Defs inadmissible

Committee Note

- Query whether reason for rule in *Franz* case (potential prejudice to poorer Def) is undercut by enactment of § 895.043(5), which prohibits joint and several liability for punitive damages

§ 895.043(4)

10) Trial Judge initially determines whether there is sufficient evidence for submission of punitive damages to jury

Kimble v
Land Concepts Inc
2014 WI 21, ¶ 44
353 Wis. 2d 377
Berner Cheese Corp
v Krug
2008 WI 95, ¶ 64,
312 Wis. 2d 251
Strenke v Hogner
2005 WI 25, ¶ 40
279 Wis. 2d 52

a. Under heightened threshold for punitive damages, Wis Supreme Ct expects Circuit Cts to serve as gatekeepers before sending question on punitive damages to jury

Kimble v
Land Concepts Inc
2014 WI 21, ¶ 44
353 Wis. 2d 377

b. Once the Judge has determined that the issue of punitive damages is properly before the jury, whether to award punitive damages is entirely within the discretion of the jury

Shopko Stores, Inc
v Kujak
147 Wis. 2d 589
(Ct. App. 1988)

11) When statute authorizes the award of punitive damages, the jury not the Judge decides whether punitive damages should be awarded and in what amount

Kimble v
Land Concepts Inc
2014 WI 21, ¶ 47
353 Wis. 2d 377

12) Jury may consider

a. Grievousness of Def's acts

b. Degree of malicious intent

c. Potential as well as actual damages

Fuchs v Kupper
22 Wis. 2d 107, 111
(1963)

d. Def's ability to pay

Franz v Brennan
146 Wis. 2d 541
(Ct. App. 1988)
aff'd, 150 Wis. 2d 1
(1989)

- When two or more Defs, evidence of wealth of Defs inadmissible

Tucker v Marcus
142 Wis. 2d 425 (1988)

13) Jury verdict for punitive damages should bear reasonable relation to actual damages

a. Consider whether § 895.043 applies

Kimble v
Land Concepts Inc
2014 WI 21, ¶44
353 Wis. 2d 377
Pac Mut Life Ins Co
v Haslip
111 S. Ct. 1032 (1991)
MCS v Hawkins,
Ash, Baptie & Co
206 Wis. 2d 158 (1996)

b. Although no mathematical bright line can be drawn, punitive damages can be so grossly excessive as to violate 14th Amendment Due Process

Jacque v
Steenberg Homes
209 Wis. 2d 605, 627
(1997)

- Grossly excessive when amount of damages is beyond what State requires to satisfy its legitimate interests in punishment and deterrence

BMW of N Am v Gore
116 S. Ct. 1589, 1598
(1996)

c. 14th Amendment guarantees notice to Def of severity of both conduct subject to punishment and the financial penalty a state may impose

BMW of N Am v Gore
116 S. Ct. 1589, 1598–
1604 (1996)
Trinity Evangelical
Lutheran Church
v Tower Ins Co
2003 WI 46
261 Wis. 2d 333
Schwigel v Kohlmann
2005 WI App 44
280 Wis. 2d 193

d. Federal guideposts for Ct reviewing punitive damages award

State Farm Mut Auto Ins
Co v Campbell
123 S. Ct. 1513 (2003)

- Degree of egregiousness or reprehensibility of conduct
- Disparity between the harm or the potential harm suffered and the punitive damages awarded
- Difference between the punitive damages and the possible civil or criminal penalties imposed for the conduct

Kimble v Land Concepts Inc, 2014 WI 21, ¶ 47, 353 Wis. 2d 377
Trinity Evangelical Lutheran Church v Tower Ins Co 2003 WI 46, ¶ 53 261 Wis. 2d 333
Schwigel v Kohlmann 2005 WI App 44, ¶ 19 280 Wis. 2d 193

e. Wisconsin guideposts for Ct reviewing punitive damages award

- Grievousness of Def's acts
- Degree of malicious intent

Kimble v Land Concepts Inc 2014 WI 21, ¶¶ 55, 65 353 Wis. 2d 377

- Whether the award bears a relationship to compensatory damages
  - — Use of fixed multiplier or fixed ratio is rejected

Kimble v Land Concepts, Inc 2014 WI 21, ¶ 65 353 Wis. 2d 377

  - — Few awards exceeding a single-digit ratio are likely to satisfy due process
- Potential damages that may have resulted
- Ratio to applicable civil or criminal penalties
- Wealth of wrongdoer

f. Reprehensibility of defendant's conduct is the most important indicium of reasonableness of a punitive damages award

Kimble v
Land Concepts Inc
2014 WI 21, ¶ 49
353 Wis. 2d 377

g. Standard for determining reprehensibility is whether:

- Harm caused was physical as opposed to economic
- Tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others
- Target of the conduct had financial vulnerability
- Conduct involved repeated actions or was an isolated incident
- Harm was the result of intentional malice, trickery, or deceit or mere accident
- Existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award, and the absence of all of them renders any award suspect

§ 805.15(6)
Malco v Midwest
Aluminum Sales
14 Wis. 2d 57 (1961)

14) Amount of jury award is judicially reviewable

MCS v Hawkins,
Ash, Baptie & Co
206 Wis. 2d 158 (1996)
Honda Motor Co v Oberg
114 S. Ct. 2331 (1994)

Due process requires judicial review to protect from arbitrary deprivation of property

Gianoli v Pfleiderer
209 Wis. 2d 509
(Ct. App. 1997)

15) Payment of punitive damages may be conditioned on Def's future conduct

CAUTION

This was a bench trial

§ 814.045

D. Atty Fees

§ 814.045(1)
Committee Comment:
see *Kolupar v Wilde*
Pontiac Cadillac, Inc
2004 WI 112,
275 Wis. 2d 1,
for historical discussion

1) Subject to § 814.045(2), in any action involving the award of Atty fees that are not governed by § 814.04(1) or involving a dispute over the reasonableness of Atty fees, the Ct shall, in determining whether to award Atty fees and in determining whether Atty fees are reasonable, consider all of the following:

§ 814.045(1)(a)

a. Time and labor required by the Atty (lodestar)

§ 814.045(1)(b)

b. Novelty and difficulty of the questions involved in the action

§ 814.045(1)(c)

c. Skill requisite to perform the legal service properly

§ 814.045(1)(d)

d. Likelihood that the acceptance of the particular case precluded other employment by the Atty

§ 814.045(1)(e)

e. Fee customarily charged in the locality for similar legal services

§ 814.045(1)(f)

f. Amount of damages involved in the action

§ 814.045(1)(g)

g. Results obtained in the action

§ 814.045(1)(h)

h. Time limitations imposed by the client or by the circumstances of the action

§ 814.045(1)(i)

i. Nature and length of the Atty's professional relationship with his or her client

§ 814.045(1)(j)

j. Experience, reputation, and ability of the Atty

§ 814.045(1)(k)

k. Whether the fee is fixed or contingent

§ 814.045(1)(L)

l. Complexity of the case

§ 814.045(1)(m)

m. Awards of costs and fees in similar cases

§ 814.045(1)(n)

n. Legitimacy or strength of any defenses or affirmative defenses asserted in the action

§ 814.045(1)(p)

o. Other factors the Ct deems important or necessary to consider under the circumstances of the case

§ 814.045(2)(a)

2) In any action in which compensatory damages are awarded, Ct shall presume that reasonable Atty fees do not exceed 3 times the amount of the compensatory damages awarded. This presumption may be overcome if Ct determines, after considering the factors set forth in § 814.045(1), that a greater amount is reasonable

§ 814.045(2)(a)

3) In any action in which compensatory damages are not awarded but injunctive or declaratory relief, rescission or modification, or specific performance is ordered, reasonable Atty fees shall be determined according to the factors set forth in § 814.045(1)

Nationstar Mortg LLC v Stafsholt 2018 WI 21, ¶ 3 380 Wis. 2d 284

4) While not damages per se, Ct may include Atty fees as part of equitable remedy "in exceptional cases and for dominating reasons of justice"

§ 814.045(3)

5) Sec. 814.045 does not abrogate the rights of persons to enter into an agreement for Atty fees, and the Ct shall presume that such an agreement is reasonable

See Cook v Public Storage, Inc 2008 WI App 155, ¶¶ 90–100, 314 Wis. 2d 426

6) Party not successful on all claims may still be entitled to all Atty fees, for example

§ 425.308(1) *Cmty Credit Plan, Inc v Johnson* 221 Wis. 2d 766 (Ct. App. 1998) *aff'd*, 228 Wis. 2d 30 (1999)

7) Atty fees are recoverable when a party prevails because of a mere procedural violation of the Wis Consumer Act

Kilian v Mercedes-Benz USA, LLC 2011 WI 65 335 Wis. 2d 566

8) Plaintiff is prevailing party entitled to recover Atty fees when party violating Wisconsin Lemon Law voluntarily ceases violations and dismisses case

Est of Miller v Storey 2017 WI 99, ¶¶ 48–62 378 Wis. 2d 358

9) Prevailing plaintiff in civil theft action under § 895.446 is entitled to Atty fees as one of the "costs of … litigation"

2. Contract

Brockmeyer v Dun & Bradstreet 113 Wis. 2d 561 (1983)

A. Damages limited by concepts of

Reiman Assocs v R/A Adv 102 Wis. 2d 305, 320 (Ct. App. 1981)

1) Foreseeability

Hale v Stoughton Hosp Assoc

126 Wis. 2d 267
(Ct. App. 1985)

Def liable for losses flowing directly and necessarily from breach and that, at time of contracting, were reasonably foreseeable as a probable result of breach; and

Kuhlman, Inc v
G Heileman Brewing Co
83 Wis. 2d 749, 752
(1978)

2) Mitigation

Party sustaining loss by another's wrongful act has duty to do all that is reasonable to avoid or mitigate damages

Stadler v Rohm
40 Wis. 2d 328 (1968)
Galatowitsch v Wanat
2000 WI App 236
239 Wis. 2d 558
Restatement (2d)
Contracts § 378 (1981)

3) Election of remedies doctrine

a. Prevents a party from pursuing remedies that are inconsistent

Wickenhauser v Lehtinen
2007 WI 82, ¶¶ 16–20,
302 Wis. 2d 4

b. Rescission of contract and restorative costs or damage are not inconsistent

Mohns Inc v
BMO Harris Bank NA
2021 WI 8, ¶ 52
395 Wis. 2d 421

4) A plaintiff may not recover damages for both breach of contract and unjust enrichment based on the same conduct

B. Damages generally available

1) Consequential damages

a. Rules of causation and certainty apply

Schubert v
Midwest Broad Co
1 Wis. 2d 497, 502–03
(1957)
T&HW Enters v
Kenosha Assocs
206 Wis. 2d 591
(Ct. App. 1996)

b. Lost profits must be estimated with reasonable certainty

Magestro v
North Star Envtl Constr

2002 WI App 182
256 Wis. 2d 744

- Gross revenues not a measure of damage

c. Rule of foreseeability

Hadley v Baxendale
156 Eng Ret 145 (1874)

- Special damages recoverable if in contemplation of parties when contract made

- Objective standard: What would a reasonable person have foreseen?

- Determine with reference to breaching party

§ 402.719(3); *Sunnyslope Grading v Miller, Bradford & Risberg*, 148 Wis. 2d 910, 916 (1989)

d. As long as not unconscionable, interest of commercial purchaser in consequential damages may be limited or excluded by contract

Murray v Holiday Rambler, Inc
83 Wis. 2d 406 (1978)

e. In absence of statute, Atty fees not recoverable as consequential damages

2) Liquidated damages/stipulated damages

§ 402.718(1)
Westhaven Assocs, Ltd v CC of Madison, Inc
2002 WI App 230
257 Wis. 2d 789

a. Unreasonable stipulated damages are deemed a penalty and therefore unenforceable

Koenings v Jos Schlitz Brewing Co
126 Wis. 2d 349 (1985)
Wassenaar v Panos
111 Wis. 2d 518 (1983)

b. Test for reasonableness is "totality of the circumstances"

§ 402.718(1)
Restatement (2d) Contracts
§ 356(1) (1981)

- Consider whether amount chosen represents reasonable effort to predict actual damages

Koenings v Joseph Schlitz Brewing Co
126 Wis. 2d 349 (1985)

— Did parties intend to provide for damages or for penalty?

Note: Express intent of parties is rarely helpful because parties' intent has little relevance to what is reasonable in law

— Is injury caused by breach difficult or incapable of accurate estimation at time of contract?

— Are stipulated damages reasonable forecast of harm caused by breach?

Wassenaar v Panos
111 Wis. 2d 518 (1983)

- If reasonable, stipulated damages in contract are liquidated and therefore enforceable

Wassenaar v Panos
111 Wis. 2d 518 (1983)

c. Burden of proof is on party seeking to avoid liquidated damages

3) Punitive damages

Mohns, Inc v BMO Harris Bank NA
2021 WI 8, ¶ 58
395 Wis. 2d 421

a. Not available in contract action

- Unless breach accompanied by fraudulent act, or

- Unless breach involves conduct sufficient to constitute independent tort

Tucker v Marcus
142 Wis. 2d 425 (1988)

- Punitive damages not available unless compensatory damages have been awarded

- Jury must award compensatory damages if awarding punitive

b. Not available under UCC

Purdy v Cap Gemini Am, Inc
2001 WI App 270
248 Wis. 2d 804

4) Atty Fees—If allowed by contract

Borchardt v Wilk
156 Wis. 2d 420, 428
(Ct. App. 1990)

a. When contract language is ambiguous as to Atty fees, and plaintiff recovers on claims and Def recovers on counterclaim, Atty fees must be reduced in proportion to amount plaintiff recovered less the amount Def recovered

Shadley v Lloyds of London

2009 WI App 165, ¶¶ 11–23, 321 Wis. 2d 189

b. When contract language is ambiguous as to Atty fees and plaintiff recovers less than damages claimed, both parties may recover portion of Atty fees

§ 806.06(4)
Purdy v
Cap Gemini Am, Inc
2001 WI App 270,
248 Wis. 2d 804

c. Atty fees constitute costs; prevailing party must file request within 30 days after entry of judgment, or fees will be barred

- However, time frame is different for small claims

5) Damages related to specific performance

Country Visions Coop v
Archer-Daniels-Midland Co, 2021 WI 35
396 Wis. 2d 470
Beidel v
Sideline Software, Inc
2013 WI 56
348 Wis. 2d 360

a. Principles governing specific performance claim are as follows:

- Whether specific performance available as a remedy
- Whether there was a substantial enough breach to warrant specific performance
- Whether the equities lie on the plaintiff's or Def's side
- Whether anything would make an order of specific performance unfair, unreasonable, or impossible

Ash Park, LLC v
Alexander & Bishop, Ltd
2009 WI App 71, ¶¶ 6–16
317 Wis. 2d 772, *aff'd*,
2010 WI 44, ¶¶ 35–55
324 Wis. 2d 703

b. May be awarded to either seller or buyer

Ash Park, LLC v
Alexander & Bishop, Ltd
2010 WI 44, ¶¶ 87–95
324 Wis. 2d 703

c. Interest may be awarded upon Ct's discretion

Osborn v Dennison
2009 WI 72, ¶ 3
318 Wis. 2d 716

d. If seller fails to return earnest money, seller elects and limits recovery to liquidated damages

Champion Cos of Wis v Stafford Dev, LLC 2011 WI App 8, ¶ 12 331 Wis. 2d 208

6) Economic waste

a. Measure of damages for injury to property

- Cost of repair,
- Cost to restore, or
- Diminished market value

Champion Cos of Wis v Stafford Dev, LLC 2011 WI App 8, ¶¶ 13, 15, 331 Wis. 2d 208

b. Economic waste rule

- When faced with multiple measures of damages, fact-finder may determine whether proposed repair or restoration of property would result in unreasonable destruction of property and thus economic waste
- Application of rule is not limited to comparison of diminished value measure of damages versus cost to repair

C. Measure of damages for selected actions

Committee Comment

Check Jury Instruction for each damages claim below

Wis JI-Cv 1812

1) Quantum meruit

Wis JI-Cv 3028; *see also Lindquist Ford, Inc v Middleton Motors, Inc*, 557 F3d 469 (7th Cir 2009)

2) Unjust enrichment

Hoffman v Red Owl Stores, 26 Wis. 2d 683, 694 (1965); *Seater Constr Co v Rawson Plumbing, Inc* 2000 WI App 232 239 Wis. 2d 152; *see also Lindquist Ford,*

Inc v Middleton Motors, Inc, 557 F3d 469
(7th Cir 2009)

3) Promissory estoppel—see Wis JI-Cv 3074 law note

a. Measure of damages

- Enforcement of promise or recovery of damages occasioned by promisor's failure to honor promise

b. Types of damages

Tynan v JBVBB, LLC
2007 WI App 265
306 Wis. 2d 522

- Expectation damages, OR

- Reliance damages

Skebba v Kasch
2006 WI App 232
297 Wis. 2d 401

c. Remedy can only be invoked when necessary to avoid injustice

Brockmeyer v Dun & Bradstreet
113 Wis. 2d 561 (1983)
Wis JI-Cv 2750

4) Wrongful discharge

DL Anderson's Lakeside Leisure Co v Anderson
2008 WI 126,
¶¶ 26–31 & nn11 & 12,
314 Wis. 2d 560

5) Violation of noncompetition clause

a. Measure is loss sustained by non-breaching party that naturally results from breach

b. Mathematical certainty not required

Schorsch v Blader
209 Wis. 2d 401
(Ct. App. 1997)

6) Breach of warranty in deed

a. Consideration paid for the land or portion of land on which title failed

b. Interest on consideration from date of payment

c. Atty fees for defending or enforcing title, whether successful or not

d. Costs, whether successful or not

DL Anderson's Lakeside Leisure Co v Anderson
2008 WI 126
314 Wis. 2d 560

7) Trademark/trade name infringement

8) Breach of contingent fee contract with Atty

Lorge v Rabl
2008 WI App 141, ¶¶ 21–23, 314 Wis. 2d 162

a. Discharge of Atty with cause

- If breach by Atty without prior benefit to client, then Atty recovers nothing

- If breach by Atty with some prior benefit to client, then Atty recovers on quantum meruit

Tesch v Laufenberg, Stombaugh & Jassak, SC
2013 WI App 103
349 Wis. 2d 633

b. Discharge of Atty without cause

Tonn v Reuter
6 Wis. 2d 498, 505 (1959)

- Atty is entitled to recover amount of contingent fee, less fair allowance for the service and expenses, which would necessarily have been expended by the discharged Atty in performing balance of contract

Tesch v Laufenberg, Stombaugh & Jassak, SC
2013 WI App 103, ¶ 21
349 Wis. 2d 633

- *Tonn* applies regardless of whether the discharged Atty performed substantial services

Tonn v Reuter
6 Wis. 2d 498, 505 (1959)

- A contingent fee agreement is always subject to supervision of the Ct as to its reasonableness

c. Atty withdraws representation

Hardison v Weinshel
450 FS 721, 723
(ED Wis 1978)

- Atty, who without justifiable cause withdraws from a case, loses all right to compensation for services rendered, as does an Atty who has a contingent-fee agreement and who fails to perform the contingency

Winston v Guelzow
2014 WI App 96, ¶ 14
356 Wis. 2d 748

- Atty who withdraws from contingent-fee case with client's permission is limited to quantum meruit recovery

3. Torts

Committee Comment

Check Jury Instruction for each damages claim below

A. Damages for certain causes of action

1) Real Property Damage

a. Measure

- If destroyed—market value

Laska v Steinpreis
69 Wis. 2d 307, 312–14
(1975)

- If damaged— (1) cost of repair; (2) cost to restore; or (3) diminished market value, whichever is less. Owner need only put in evidence regarding one measure of damages. Def, if dissatisfied, must put in evidence of alternative measure of damage

- If nonexistent market value—replacement or intrinsic value

Schwalbach v Antigo Elec & Gas
27 Wis. 2d 651, 662
(1965)

- For loss of use of residence—fair rental of equivalent dwelling plus reasonable value of incidentals occasioned by moving

b. Economic waste rule

Champion Cos of Wis v Stafford Dev, LLC
2011 WI App 8, ¶ 13
331 Wis. 2d 208

- When faced with multiple measures of damages, fact-finder may determine whether proposed repair or restoration would result in unreasonable destruction of property and thus economic waste

Champion Cos of Wis v Stafford Dev, LLC
2011 WI App 8, ¶ 15
331 Wis. 2d 208

- Application of rule is not limi**ted to comparison of diminished value measure** of damages versus cost to repair

Grygiel v Monches Fish & Game Club, Inc
2010 WI 93, ¶ 44
328 Wis. 2d 436

c. Trespass—Nominal damages always appropriate; however, if proved, compensatory damages may also be awarded

2) Slander of Title to Real Estate

§ 706.13

a. Measure

Restatement (2d) of Torts
§ 633 (1977)

- Actual damages (special damages)

Tym v Ludwig
196 Wis. 2d 375
(Ct. App. 1995)

— Loss of sale to particular purchaser OR if plaintiff can show with reasonable certainty that slanderous statement deprived them of market that otherwise would have been available

— Loss of market for sale to unknown persons who are impossible to identify. Trial Ct must consider whether it is reasonable to require plaintiff to prove loss of sale to particular purchaser. If not reasonable, plaintiff permitted to show loss of market

§ 706.13

- Punitive damages of $1,000

Wis JI-Cv 2200–2201

3) Misappropriation or Conversion of Chattel (Personal Property)

Wis JI-Cv 1806

4) Loss of/Injury to Growing Crop

5) Unlawful Cutting of Timber

§ 26.09
Tydrich v Bomkamp
207 Wis. 2d 632
(Ct. App. 1996)

a. Quadruple or double damages allowed: market value of trees less cutting cost offset by value of logs

Swedowski v Westgor
14 Wis. 2d 47, 52–53
(1961)

b. Applies to negligent or willful cutting

6) Loss of Livestock

Schrubbe v
Peninsula Vet Serv
204 Wis. 2d 37
(Ct. App. 1996)

Market value as determined by cost of replacement less salvage value

Wis JI-Cv 2400 law note
Wis JI-Cv 2401–2420

7) Misrepresentation

Wis JI-Cv 2500 law note

8) Defamation

§ 895.035(4)

9) Parental Liability for Willful, Malicious, or Wanton Act of Child

a. Up to $5,000 for each act

NEM v Strigel
208 Wis. 2d 1 (1997)

b. Series of similar acts are treated as separate occurrences

B. Negligence actions generally

§ 895.043
Brown v Maxey
124 Wis. 2d 426 (1985)

1) Punitive damages available if outrageous conduct actually proven

Committee Comment

a. Although the holding of *Brown v Maxey* has not been expressly overruled, there is a question as to whether it is still good law in light of § 895.043(3), which requires a showing of conduct that is either malicious or in intentional disregard of plaintiff's rights to recover punitive damages

Franz v Brennan
150 Wis. 2d 1 (1989)
Lievrouw v Roth
157 Wis. 2d 332, 344
(Ct. App. 1990)

b. Burden of proof for outrageous conduct is clear and convincing

§ 895.045

2) Comparative negligence

a. Plaintiff may recover damages from Def if plaintiff's negligence not greater than that of Def

Wis Natural Gas Co v
Ford, Bacon & Davis
Constr Corp
96 Wis. 2d 314 (1980)

b. In multi-Def cases, compare plaintiff's negligence with the separate negligence of each Def

- In products-liability action, follow analysis in § 895.045(3)

§ 895.045

c. Def's liability to plaintiff is determined in proportion to percentage of causal negligence attributable to each Def

- Person whose causal negligence is 51% or more is jointly and severally liable to plaintiff for all resulting damages. Def whose causal negligence is 50% or less is liable only if the negligence of such Def exceeds the causal negligence of the plaintiff. Liability is then limited to the percentage of the total causal negligence attributed to such Def

§ 895.045(2)

- Defs acting pursuant to a common scheme or plan are jointly and severally liable to plaintiff for all resulting damages

Bielski v Schulze
16 Wis. 2d 1 (1962)

d. Liability of Defs for contribution is determined in proportion to the negligence attributable to each

3) Plaintiff's contributory negligence

a. Must not be greater than 50%

b. Must not be greater than Def from whom recovery sought or plaintiff cannot recover from that Def

Vogel v
Liberty Mut Ins Co
214 Wis. 2d 443
(Ct. App. 1997)

4) Increased premiums to worker's compensation carrier occasioned by tortfeasor's wrongful conduct are not recoverable as damages

C. Selected negligence actions

Bowen v
Lumbermens Mut Cas Co
183 Wis. 2d 627 (1994)

1) Negligent infliction of emotional distress—Liability (to a bystander) of a tortfeasor who negligently and seriously injures another

a. Finder of fact determines traditional tort negligence elements

- Negligent conduct

- Causation in fact

- Injury (severe emotional distress) that need not be accompanied by any physical manifestation

b. Ct determines public policy considerations (an aspect of legal cause)

- Whether there was a fatal or severe injury to victim as a result of tortfeasor's negligent conduct
- Whether victim is a member of plaintiff's immediate family (spouse, parent-child, grandparent-grandchild, or sibling)
- Whether there were extraordinary circumstances surrounding plaintiff's discovery of the injury

Conant v
Physicians Plus Med Grp
229 Wis. 2d 271
(Ct. App. 1999)

- Legal guardian may not recover for loss of minor ward's society and companionship

c. Exceptions: no recovery

Babich v
Waukesha Mem'l Hosp
205 Wis. 2d 698
(Ct. App. 1996)

- Needlestick injury unless contaminated source can be shown

Kleinke v Farmers Coop
202 Wis. 2d 138
(Ct. App. 1996)

- Damage to property

Phelps v
Physicians Ins Co of Wis
2009 WI 74
319 Wis. 2d 1

- Medical malpractice

Pierce v
Physicians Ins Co
2005 WI 14
278 Wis. 2d 82

— However, mother in childbirth malpractice case can maintain claim, because she was a participant in, rather than bystander to, malpractice against her child

2) Personal injury

Alsteen v Wauleco, Inc
2011 WI App 105
335 Wis. 2d 473

a. Must have an actual injury—mere exposure not enough to state a personal-injury claim

- Increased risk of cancer is not an actual injury

- Need for medical monitoring is not an actual injury

Theama v
City of Kenosha
117 Wis. 2d 508, 524
(1984)

b. Damages for loss of society and companionship limited to members of nuclear family (parents and their minor children)

Shockley v Prier
66 Wis. 2d 394 (1975)
Est of Wells v
Mt Sinai Med Ctr
183 Wis. 2d 667 (1994)

- Parent may recover for loss of minor child's society and companionship, but not for that of an adult child

Theama v
City of Kenosha
117 Wis. 2d 508 (1984)

- Minor child may recover for loss of parent's society and companionship

Conant v Physicians
Plus Med Grp
229 Wis. 2d 271
(Ct. App. 1999)

- Legal guardian may not recover for loss of minor ward's society and companionship

Affett v Milw &
Suburban Transp Corp
11 Wis. 2d 604 (1960)

c. Future damages to be reduced to present value, EXCEPT for damages for future pain and suffering, when awarded

Kramer v Chic, Milw,
St Paul & Pac RR
226 Wis. 118 (1937)

- For loss of earning capacity

Sweet v
Chicago & NW Ry
157 Wis. 400 (1914)

- For loss of future support for dependent in wrongful death case

- To compensate for future hospital or medical expenses

Miller v
Wal-Mart Stores, Inc
219 Wis. 2d 250 (1998)
Wis JI-Cv 1383

3) Negligent hiring, training, retention, or supervision

Committee Comment

a. The Supreme Ct in *Miller* reviewed the evidence of conduct justifying a punitive damages award under *Brown v Maxey*, 124 Wis. 2d 426, 433 (1985), which was decided before codification of the standard of conduct for punitive damages in § 895.043(3)

Pritzlaff v
Archdiocese of Milw
194 Wis. 2d 302 (1995)

b. Not available against religious governing body

§ 174.02

4) Injury by dog (negligence or strict liability)

Becker v State Farm
Mut Auto Ins
141 Wis. 2d 804
(Ct. App. 1987)

a. Owner is strictly liable for injuries caused by dog, subject only to the defense of comparative negligence

§ 174.001(5)
Augsburger v
Homestead Mut Ins Co
2014 WI 133
359 Wis. 2d 385

- "Owner" is "any person who owns, harbors or keeps a dog"

§ 174.001(5)
Augsburger v
Homestead Mut Ins Co
2014 WI 133
359 Wis. 2d 385

— *Augsburge*r specifically addresses "harbors"

Armstrong v
Milw Mut Ins Co
202 Wis. 2d 258 (1996)

- Exception to rule of strict liability exists when injured plaintiff kept or harbored dog under § 174.001(5)

Campenni v Walrath
180 Wis. 2d 548 (1994)

b. Dogs are "property" under statute providing for award of double damages if dog injures person, "property" or livestock and owner has notice or knowledge that dog has previously injured person, "property" or livestock

Malone v Fons
217 Wis. 2d 746
(Ct. App. 1998)

c. Landlord not liable in negligence or strict liability under § 174.02 for injuries caused by a tenant's dog

Fire Ins Exch v
Cincinnati Ins Co
2000 WI App 82
234 Wis. 2d 314

d. There may be joint liability between owner and keeper under either negligence or statutory liability

Alwin v State Farm
Fire & Cas Co
2000 WI App 92
234 Wis. 2d 441

e. Public policy precludes owner liability for injuries resulting from plaintiff tripping over sleeping dog

§ 174.02(1)(b)

f. Double damages only available when dog bites a person with sufficient force to break the skin and cause permanent physical scarring or disfigurement if owner was notified or knew that the dog had previously, without provocation, bitten a person as described above

§ 893.555

5) Limitation of damages; long-term care providers

§ 893.555(4)

a. Total noneconomic damages for bodily injury, including actions based on contribution or indemnification, may not exceed limit under § 893.55(4)(d)—currently $750,000

b. Applies for each occurrence on or after 2/1/11

c. Applies to all care or treatment performed or from any omission by all long-term providers and all employees acting within the scope of their employment and providing long-term care services

§ 893.555(8)

d. Collateral source payments are admissible in an action for negligence under § 893.555, but § 893.555 does not limit the substantive or procedural rights of persons with claims based on subrogation

D. Tort claims against gov't subdivisions, officers, or employees

§ 893.80(3)

1) Recovery for any damages, injuries, or death in any action founded on tort against any gov't subdivision or its officers or employees shall not exceed $50,000

Anderson v Hebert
2013 WI App 54,
¶¶ 22–23
347 Wis. 2d 321

2) Sec. 893.80(3) provides for one damages cap, per person, per action; damages cap cannot be stacked based on an individual's separate claims or causes within a single action

Bostco LLC v Milwaukee Metro Sewerage Dist
2013 WI 78
350 Wis. 2d 554

3) Statutory cap on damages is constitutional

Bostco LLC v Milwaukee Metro Sewerage Dist
2013 WI 78
350 Wis. 2d 554

4) Statutory cap on damages does not limit equitable relief

4. Economic Loss Doctrine

Tietsworth v Harley Davidson, Inc
2004 WI 32, ¶ 23
270 Wis. 2d 146

A. Judicially created remedies principle that precludes contracting parties from pursuing tort recovery for purely economic or commercial losses associated with contractual relationship

Daanen & Janssen, Inc v Cedarapids, Inc
216 Wis. 2d 395 (1998)
Sunnyslope Grading v Miller, Bradford & Risberg
148 Wis. 2d 910 (1989)

B. Policies

1) Maintain distinction between tort law and contract law

2) Protect commercial parties' freedom to allocate economic risk by contract

3) Encourage purchaser, party best suited to assess risk of economic loss, to assume, allocate, or insure against that risk

C. Recovery in tort of "economic damages" barred

Selzer v Brunsell Bros
2002 WI App 232
257 Wis. 2d 809

1) Bars recovery from the manufacturer by both a remote and direct purchaser of a product, under theories of strict liability or negligence

Stuart v Weisflog's Showroom Gallery, Inc
2008 WI 22
308 Wis. 2d 103

a. When transaction includes both goods and services, rule applies as long as predominant purpose of transaction is purchase of goods. *See also* **Sec. 4.F.**4), *infra*

Linden v Cascade Stone Co
2005 WI 113
283 Wis. 2d 606

- Test for predominant purpose of a mixed contract is "totality of the circumstances." Consider:

— Amount charged for services versus materials

— Purpose or thrust of contract

— Language used in contract to describe project

Selzer v Brunsell Bros
2002 WI App 232
257 Wis. 2d 809
Prent Corp v Martek Holdings, Inc

2000 WI App 194
238 Wis. 2d 777

- But doctrine applies to bar claim for strict liability and negligent misrepresentation that induces contract

State Farm Mut Auto Ins Co v Ford Motor Co
225 Wis. 2d 305 (1999)

b. Applies to both consumer and commercial transactions

Caveat

- Ct does not decide whether strict liability claim is precluded when plaintiff shows

— Parties of unequal bargaining power

— Product is a necessity

— No alternative source for product readily available

— Purchaser cannot reasonably insure against consequential damages

Linden v Cascade Stone Co
2005 WI 113
283 Wis. 2d 606

2) Bars homeowners' recovery from subcontractors for negligent construction

Van Lare v Vogt, Inc
2004 WI 110
274 Wis. 2d 631

3) Bars strict liability claim for misrepresentation arising out of sale of commercial real estate

Hinrichs v Dow Chem Co
2020 WI 2, ¶¶ 32–36
389 Wis. 2d 669
Kaloti Enters v Kellogg Sales Co
2005 WI 111
283 Wis. 2d 555

4) Bars claim for fraud, if fraud is part of contract

Below v Norton
2008 WI 77, ¶ 3 n2,
310 Wis. 2d 713

5) Bars negligent misrepresentation

§ 895.10

6) Sec. 895.10 supersedes *Below* for residential real estate sales for fraud and intentional misrepresentation

Mechanical, Inc v Venture Elec Contractors, Inc
2020 WI App 23
392 Wis. 2d 319

7) Bars negligence claims by one subcontractor against another subcontractor for delay-related damages when both subcontractors subject to interrelated contracts with prime contractor

D. Economic damages are losses attributable to product itself or monetary losses caused by the defective product. Includes

1) Direct economic loss—loss in value of product itself

Wausau Tile v
Cty Concrete Corp
226 Wis. 2d 235 (1999)
Cincinnati Ins Co
v AM Int'l
224 Wis. 2d 456
(Ct. App. 1999)

a. Includes loss to new or used product attributable to defective component part (integrated product or integrated system rule)

Bay Breeze Condo Ass'n
v Norco Windows, Inc
2002 WI App 205
257 Wis. 2d 511

- Integrated system rule applies to building construction

Mose v Tedco Equities
228 Wis. 2d 848
(Ct. App. 1999)

b. Includes real estate

E. Does not bar commercial purchaser's claim based on personal injury or damage to property other than product or on economic losses that are alleged in combination with noneconomic losses

1) "Other property" exception will not apply if

Grams v Milk Prods, Inc
2005 WI 112
283 Wis. 2d 511
Selzer v Brunsell Bros
2002 WI App 232
257 Wis. 2d 809

a. Claim involves "disappointed performance expectations"

OR

Linden v
Cascade Stone Co
2005 WI 113
283 Wis. 2d 606
Wausau Tile v
Cnty Concrete Corp
226 Wis. 2d 235 (1999)

b. Product was component part of integrated system

F. Exceptions to application of doctrine

Northridge v
WR Grace & Co
162 Wis. 2d 918, 937–38
(1991)

1) Threat to public safety

Douglas-Hanson Co
v BF Goodrich Co
229 Wis. 2d 132
(Ct. App. 1999)
aff'd, 2000 WI 22
233 Wis. 2d 276

2) Fraud in inducement

Kaloti Enters v
Kellogg Sales Co
2005 WI 111
283 Wis. 2d 555

a. Plaintiff must show that

- There was an intentional misrepresentation (five elements)
- Misrepresentation occurred before contract was formed
- Fraud was extraneous to, rather than interwoven with, the contract

Hinrichs v Dow Chem Co
2020 WI 2, ¶ 55
389 Wis. 2d 669

3) False advertising or other deceptive trade practices claim under § 100.18(1)

Stuart v Weisflog's
Showroom Gallery, Inc
2008 WI 22, ¶¶ 32–37
308 Wis. 2d 103

4) Statutory claims of public policy (such as under Home Improvement Practices Act)

Ins Co of N Am
v Cease Elec Co
2004 WI 139
276 Wis. 2d 361

5) Service contracts

Hinrichs v Dow Chem Co
2020 WI 2, ¶¶ 40–47
389 Wis. 2d 669

6) Other property

a. Economic loss doctrine does not preclude a product purchaser's claims of damage to property other than the product itself

b. A two-part test is used to determine whether the damaged property is "other property" in a legal sense:

- First, is property part of an "integrated system"? If part is integrated into a completed product or system, the entire product or system ceases to be other property, and the economic loss doctrine applies

- Second, if not part of "integrated system," then is the loss a result of "disappointed expectations?":

— Disappointed expectations test asks whether the purchaser should have foreseen that the product could cause the damage at issue. If damage is result of disappointed expectations, then the economic loss doctrine applies

5. Mitigation

Lobermeier v Gen Tel Co
119 Wis. 2d 129 (1984)

A. Torts

1) Plaintiff has duty to mitigate damages re: Injury

a. Mitigation does not require plaintiff to seek cure that

- Involves substantial hazard of death

- Is unduly painful

- Involves treatment offering mere possibility of cure

Marciniak v Lundberg
153 Wis. 2d 59, 69 (1990)

b. Plaintiff need only take reasonable measures to mitigate avoidable consequences of damages

SC Johnson & Son, Inc v Morris
2010 WI App 6, ¶¶ 23–29
322 Wis. 2d 766

c. Victim must have actual knowledge of the intentional tort before there is a duty to mitigate damages

Lobermeier v Gen Tel Co
119 Wis. 2d 129, 148
(1984)
Byrnes v Metz
53 Wis. 2d 627, 631–33
(1972)

2) Failure to mitigate damages is affirmative defense that must be raised by answer

If defense is not raised, it is deemed waived

B. Breach of contract or tort actions re: Property damages

Kuhlman, Inc v
G Heileman Brewing Co
83 Wis. 2d 749 (1978)
Monroe Cty Fin Co
v Thomas
243 Wis. 568 (1943)

1) Injured party has duty to mitigate but attempts to mitigate must only be reasonable

Langreck v WILMIC
226 Wis. 2d 520
(Ct. App. 1999)

Specific mitigation action need not be taken if contrary to advice of counsel

Sprecher v Weston's Bar
78 Wis. 2d 26 (1977)

C. Trial Ct has discretion to admit proof or lack of mitigation at variance with pleadings and amend pleadings to conform to proof

6. Damages for Wrongful Death

Waranka v
Wadena Ins Co
2014 WI 28, ¶ 3
353 Wis. 2d 619

A. Secs. 895.03 and 895.04 only apply when death occurs in State of Wis

Without a wrongful death action under § 895.03, the terms and limits of § 895.04 cannot be applied separately

§ 895.04

B. Measure: Generally, loss to survivors

Weiss v Regent Prop
118 Wis. 2d 225, 230
(1984)

C. Wrongful death cause of action is purely statutory; no common-law right exists

§ 895.04(3)

1) Separate actions for same wrongful death "shall be consolidated on motion of any party"

§ 895.04(2)

2) If deceased leaves surviving spouse or domestic partner and minor children, Ct shall set aside funds to protect children not to exceed 50% of recovery

§ 895.04(2)

3) If no minor children, claim belongs to surviving spouse or domestic partner

Bowen v
Am Fam Ins Co
2012 WI App 29
340 Wis. 2d 232

4) Surviving spouse or domestic partner cannot disclaim wrongful death claim to benefit adult children

5) Surviving adult children have no claim as long as spouse or domestic partner survives

D. Recovery

1) Estate

§ 895.04(5)

a. Medical and funeral expenses

b. Pain and suffering

2) Spouse or domestic partner

a. Medical and funeral expenses

b. Loss of earning capacity of decedent

c. Loss of consortium

§ 895.04(4)

- No more than $350,000 recoverable for loss of society and companionship

§ 893.55(4)(f)

- Statutory limit also applies to medical malpractice actions

Bartholomew v
Wis Patients Comp Fund
2006 WI 91
293 Wis. 2d 38

- Separate medical malpractice cap applies to predeath claims

d. Loss or diminution of future inheritance

e. Pecuniary loss

3) Dependent children

a. May recover for reasonable expectation of pecuniary advantage children had by receiving share of parent's potential earnings as next of kin

b. May recover for reasonable expectation of pecuniary benefit of support

c. May recover value of care and nurture that would have been given

d. Medical and funeral expense

e. Loss or diminution of future inheritance

f. Pecuniary loss

g. Loss of society and companionship

Jelinek v St Paul Fire & Cas Ins Co
182 Wis. 2d 1 (1994)

- In medical malpractice action involving death, dependent children may maintain separate claim for loss of society and companionship even though decedent is survived by spouse who brings similar claim

Force v Am Fam Mut Ins Co
2014 WI 82
356 Wis. 2d 582

h. Minor children can recover for the wrongful death of their parent when the deceased leaves behind a spouse who was estranged from the deceased and who is precluded from recovering for the wrongful death

i. See **Settlements**, **CV 40**

4) Parents

a. Medical and funeral expenses

b. Loss or diminution of future inheritance

Est of Lamers v Am Hardware Mut Ins Co
2008 WI App 165
314 Wis. 2d 731

- Parents cannot recover lost inheritance when deceased child's life expectancy exceeds parents' life expectancy

- Parents cannot recover lost inheritance on behalf of potential heirs of deceased child

c. Loss of society and companionship

Chang v St Farm Mut Auto Ins Co
182 Wis. 2d 549 (1994)

- Claim of innocent non-tortfeasor parent is not subject to reduction for negligence of other parent

§ 895.04(4)

- Limited to $500,000 per occurrence

d. Pecuniary loss

§ 895.04(2)
§ 852.01(1)(c)
Bruflat v Prudential Prop & Cas Ins Co
2000 WI App 69
233 Wis. 2d 523,
withdrawn in part by
Day v Allstate Indem Co
2011 WI 24
332 Wis. 2d 571

e. Divorced parents share equally in proceeds recovered under either parent's uninsured motorist coverage

Tesar v Anderson
2010 WI App 116
329 Wis. 2d 240

f. Parent can recover for death of unborn child

§ 852.01
Pierce v Am Fam Mut Ins Co
2007 WI App 152
303 Wis. 2d 726

5) Nondependent children, including adult children, and other lineal heirs

§ 895.04(2)

a. Loss of society and companionship

§ 893.55(4)(f)
Czapinski v St Francis Hosp
2000 WI 80
236 Wis. 2d 316

- Although recovery is available in wrongful death actions generally, Ch 655 bars recovery in medical malpractice action

§ 895.04

b. Pecuniary loss

c. Medical and funeral expenses

d. Loss or diminution of future inheritance

Schaefer v Am Fam Mut Ins Co
192 Wis. 2d 768 (1995)

- Evidence of receipt of life insurance proceeds is admissible in determining plaintiff's damages for loss of inheritance only if plaintiff establishes that decedent intended to use cash value of policy for investment

purposes

Petta v ABC Ins Co
2005 WI 18
278 Wis. 2d 251

6) Doctrine of equitable antisubrogation (i.e., the "made-whole" doctrine) may apply

Wangen v Ford Motor Co
97 Wis. 2d 260 (1980)

E. Punitive damages may not be awarded in wrongful death action

7. Rules for Multiple Defs

A. Apportion damages to separate injuries suffered in same transaction according to harm from each

Johnson v Heitz
73 Wis. 2d 286 (1976)

B. When injury/damage caused by successive Defs, damages apportioned

Foley v City of West Allis
113 Wis. 2d 475 (1983)

C. As a general rule, when there is a logical basis to allocate damages between two or more incidents and among various parties, Cts should do so

Butzow v
Wausau Mem'l Hosp
51 Wis. 2d 281 (1971)

D. Inseparability of damages does not create joint liability of successive tortfeasors

CV 23: COSTS

1. Generally

§ 814.01

A. Shall be allowed to plaintiff upon recovery

Sampson v Logue
184 Wis. 2d 20
(Ct. App. 1994)

1) Includes subrogated plaintiff

Briggs v
Farmers Ins Exch
2000 WI App 40
233 Wis. 2d 163

2) Taxable costs not authorized in arbitration cases

§ 814.03

B. Shall be allowed to Def if plaintiff not entitled

Zintek v Perchik
163 Wis. 2d 439

(Ct. App. 1991)
overruled in part
on other grounds in
Steinberg v Jensen
194 Wis. 2d 439 (1995)

C. Multiple parties each entitled to recover costs

Paulson v Allstate Ins Co
2002 WI App 168,
¶¶ 56–62
256 Wis. 2d 892
rev'd on other grounds
2003 WI 99
263 Wis. 2d 520

However, compulsorily joined parties limited to actual disbursements

Schaefer v Northern
Assurance Co of Am
182 Wis. 2d 148, 162
(Ct. App. 1994)

D. Trial Ct has "inherent power" beyond statutory authority to impose costs as sanction

Gospodar v
Milw Auto Ins Co
249 Wis. 332 (1946)

2. Costs and Fees That Are Recoverable

§ 814.04(2)

A. Mandatorily recoverable costs—"All the necessary disbursements and fees allowed by law," including

§ 814.04(2)

1) Fees for service of process

2) Amounts paid for certified and other copies in any public office

3) Postage, photocopying, telephone, electronic communications, faxes, and express or overnight delivery

Zurich Am Ins Co
v WPS Ins Corp
2007 WI App 259, ¶ 43
306 Wis. 2d 617

a. "Photocopying" does not include digital electronic reproduction of hard copy documents

Mercer v
City of Fond du Lac
2010 WI App 15, ¶¶ 18–
19, 323 Wis. 2d 67

b. "Photocopying" expenses need not be paid out to third party to be recoverable

4) Electronic filing fee prescribed in § 801.18(7)(c)

5) Deposition fees (including copies)

6) Photographs, not exceeding $100 for each item

7) Expert witness fees, not exceeding $300 for each expert, plus standard witness fee and mileage

McLoone Metal Graphics, Inc v Robers Dredge, Inc
58 Wis. 2d 704 (1973)

Expert must testify at trial for fees to be recoverable

8) Costs of abstract of title and plat

Cost for plat may not exceed may not exceed $100 for each item

Kleinke v Farmers Coop Supply & Shipping
202 Wis. 2d 138 (1996)

B. Items of costs not specifically referred to in statute are not recoverable

Stewart v Farmers Ins Grp
2009 WI App 130
321 Wis. 2d 391
Allied Processors, Inc v Western Nat'l Mut Ins Co
2001 WI App 129
246 Wis. 2d 579

However, prevailing plaintiff in bad-faith action may recover as compensatory damages all reasonable expenses incurred in litigating the bad-faith claim

§ 814.04(1)

C. Atty fees

Kolupar v Wilde Pontiac Cadillac, Inc
2004 WI 112, ¶ 17
275 Wis. 2d 1
Wis Ret Teachers Ass'n v Employe Tr Funds Bd
207 Wis. 2d 1 (1997)

1) Generally, Wis has adopted American rule: Each litigant pays own Atty's fee

2) Exceptions to American rule of nonrecoverability of Atty fees

a. Statutory exceptions

§ 814.04(1)(a)
§ 799.01(1)(d)

- Sec. 814.04 Atty fees shall be

— $500, when amount recovered or value of property involved is greater than $10,000

— $300, when amount recovered or value of property involved is at least $1,000 but equal to or less than $10,000

— $100, when amount recovered or value of property involved is less than $1,000

— $300 in all other cases, in which there is no amount recovered or in which no property is involved

§ 814.04(6)

— For default judgments, ½ above statutory amounts

§ 814.04(1)(c)

— Not taxable by prevailing party, unless party appears by Atty other than self

§ 814.04 (intro)

Note: Sec. 814.04 schedule of Atty fees does not apply to awards for costs on frivolous claims (§ 802.05).

- Statutes allowing for Atty fees beyond the statutory amounts in § 814.04:

§ 14.11(2)	Special State Counsel
§ 17.11(2)	District Atty, Temporary
§ 17.14(4)	Removal of Assessor or Other Officer
§ 19.37(2)	Public Records, Mandamus Action to Release
§ 32.28(1)	Eminent Domain, Recovery of Reasonable Atty (and Other) Fees
§ 51.61(7)(a)	Mental Health Act, Violation of Patients' Rights, See *Wright v. Mercy Hosp*, 206 Wis. 2d 449 (Ct. App. 1996)
§ 75.42(2)	Tax Deed, Action Under
§ 102.26	Worker's Compensation Cases
§ 103.56(5)	Labor Dispute Case
§ 108.09(8)	Unemployment Insurance Cases
§ 109.03(6)	Wage Claim
§ 128.17(1)	Creditors' Actions
§ 218.0163(2)	Defective Used Vehicles
§ 227.485	Individual, Small Business, Small Nonprofit Corp Contested Case Against State Agency
§ 403.604(1)	Commercial Paper, Tender of Payment as Affecting Liability for Fees

§ 422.411 Consumer Credit Transactions, Limits on Agreements for

§ 425.308 Actions in Which Customer Prevails

§ 428.103(1)(e) Foreclosure on First Lien Real Estate

§ 618.48 Unauthorized Insurers

§ 645.54(10) Insurer's Liquidation Proceedings

§ 655.013 Health-Care Liability Actions

§ 757.36–.37 Lien Enforcement

§ 757.48 Guardian ad Litem

§ 757.99 Judicial Misconduct and Permanent Disability Proceedings

§ 767.241 Actions Affecting Families

§ 767.264(2) Divorce Action, Dismissal

§ 799.25 Small Claims Actions in Circuit Court

§ 814.08 Municipal Court, Appeal from

§ 814.46–.47 When Collected

§ 842.21 Partition

§ 851.40,
§ 865.16(1m) Probate Proceedings

§ 879.37 Will Contests

Est of Miller v Storey
2017 WI 99
378 Wis. 2d 358

§ 895.446(3)(b) Property Damage Caused by Crime

§ 946.87(4) Racketeering Violations

§ 949.14 Victims of Crimes

Also, Federal causes of action, See Sec. 1983, **CV 44**

b. Common-fund doctrine

Alyeska Pipeline Co v Wilderness Soc'y
95 S. Ct. 1612 (1975)

- Before a Ct adopts common-fund recovery for payment of Atty fees, 3 factors should be present:

— Those benefiting from litigation should be small in number and easily identifiable

— Benefits should be traceable with some accuracy

— Atty fees should be capable of being "shifted with some exactitude to those benefiting"

- In certain class actions, under specific rules, common-fund doctrine may apply

Talmer Bank & Tr v Jacobsen 2018 WI App 15, ¶ 9 380 Wis. 2d 171
Weinhagen v Hayes 179 Wis. 62 (1922)

c. "Third-party" litigation or "collateral litigation" exception—when litigation meets two requirements

- Party from whom fees are sought must have committed a wrongful act against party seeking Atty fees, and

- Commission of such wrongful act forced the party seeking fees into litigation with a third party, or required the party seeking Atty fees to incur expenses protecting that party's interests against claims arising from the wrongful act

d. Contract action

Nationstar Mortg LLC v Stafsholt 2018 WI 21 380 Wis. 2d 284

e. Equitable-claims

§ 814.045

3) Calculation of reasonable Atty fees. *See* **CV 22, Sec. 1.D.**

§ 807.01
§ 814.04(7)

3. Offers of Judgment/Settlement

Pachowitz v LeDoux 2003 WI App 120, ¶ 43 265 Wis. 2d 631

A. Sec.

807.01 employs 3-step methodology

1) Determine whether offer is sufficient under case law standards

2) Measure offer against judgment to determine whether party qualifies for statutory benefits

3) Determine appropriate benefits

§ 807.01(1)

B. Offer by Def of judgment to plaintiff in certain amount

Sachsenmaier v Mittlestadt
145 Wis. 2d 781
(Ct. App. 1988)

1) Must be designated "Offer of Settlement" on face to be effective

2) Must be served at least 20 days before trial

3) Plaintiff has 10 days after receipt in which to accept offer in writing

a. If accepted, plaintiff must serve notice of acceptance

Sonnenburg v Grohskopf
144 Wis. 2d 62
(Ct. App. 1988)

b. Offer may be withdrawn before acceptance within 10-day period, however

Briggs v Farmers Ins Exch
2000 WI App 40
233 Wis. 2d 163

c. 10-day period tolled by judicial stay of action

4) If offer not accepted and plaintiff fails to recover more favorable judgment

a. Plaintiff recovers no costs

b. Def recovers costs computed on demand in plaintiff's complaint

Duello v Bd of Regents
220 Wis. 2d 554
(Ct. App. 1998)

c. For discussion of "favorable," see *Duello* case

§ 807.01(2)

C. Offer by Def of amount of damages to be assessed against Def should Def fail in defense of liability at trial

1) Must be served at least 20 days before trial

2) Plaintiff has 10 days after receipt to accept offer in writing

If accepted, plaintiff must serve notice of acceptance

3) If offer not accepted and plaintiff does not recover more damages than those offered by Def, neither party recovers costs

§ 807.01(3), (4)

D. Offer of settlement to Def by plaintiff of damages plus costs

Northridge Co v
WR Grace & Co
205 Wis. 2d 267
(Ct. App. 1996)

1) Offer of amount in settlement is compared to judgment exclusive of costs

2) Must be served at least 20 days before trial

3) Def has 10 days after receipt to accept offer in writing

If accepted, Def must serve notice of acceptance

Gorman v
Wausau Ins Cos
175 Wis. 2d 320
(Ct. App. 1993)

4) If offer not accepted and plaintiff recovers a more favorable judgment, plaintiff recovers double costs and interest on amount recovered

§ 807.01(4)
Nelson v McLaughlin
211 Wis. 2d 487 (1997)

a. Party making offer entitled to interest on the amount recovered against that party from date of offer until payment

Blank v USAA
Prop & Cas Ins Co
200 Wis. 2d 270
(Ct. App. 1996)

- Amount recovered is policy limits, not full judgment

§ 807.01(4)
Dobbratz Trucking &
Excavating
v PACCAR, Inc
2002 WI App 138, ¶ 31
256 Wis. 2d 205

- "Amount recovered" does not include special Atty fees and costs awardable pursuant to another statute. Therefore, § 807.01(4) interest on special Atty fees and costs is prohibited

§ 807.01(3)
Stewart v
Farmers Ins Grp
2009 WI App 130
321 Wis. 2d 391
Alberte v Anew
Health Care Servs, Inc

2004 WI App 146
275 Wis. 2d 571

- "With costs" can include Atty fees when underlying statute includes Atty fees as part of plaintiff's remedy, e.g., Americans with Disabilities Act, etc.

§ 807.01(4)
Lands' End, Inc v City of Dodgeville
2016 WI 64
370 Wis. 2d 500

b. Interest recovered pursuant to an offer of judgment/settlement is at the rate allowed by statute when the judgment is entered (now 1% plus prime), not the rate when the offer is made (formerly 12% under the pre-2011 statute)

Cue v Carthage Coll
179 Wis. 2d 175
(Ct. App. 1993)

E. Offer must clearly state settlement

Pachowitz v LeDoux
2003 WI App 120,
¶¶ 39–40
265 Wis. 2d 631

1) Obligation of party making offer of settlement or offer of judgment to do so in clear and unambiguous terms

Any ambiguity construed against drafter

Mews v Beaster
2005 WI App 53
279 Wis. 2d 507

2) Offer must be sufficiently clear to enable offeree to fully and fairly evaluate offer from offeree's own perspective

a. Offeree's ability to fully and fairly evaluate offer is limited to four corners of offer itself

b. Pending dispositive motion at time offer is made does not affect offeree's ability to fully and fairly evaluate offer

Prosser v Leuck
225 Wis. 2d 126 (1999)

3) General rule does not work well when insurer receives offer of settlement that is ambiguous re: whether it applies only to insurer or both insurer and insured

a. Duty is on insurer to clarify ambiguity

b. Failure to clarify offer results in a valid offer under § 807.01

Testa v Farmers Ins Exch
164 Wis. 2d 296
(Ct. App. 1991)
Wilber v Fuchs
158 Wis. 2d 158
(Ct. App. 1990)

White v General Cas Co
118 Wis. 2d 433
(Ct. App. 1984)

F. Effectiveness of types of offers on statutory provisions of § 807.01

Osman v Phipps
2002 WI App 170
256 Wis. 2d 589

1) Statutory provisions apply only after entry of judgment

Testa v Farmers Ins Exch
164 Wis. 2d 296
(Ct. App. 1991)

a. One plaintiff, joint offer of settlement to multiple Defs

- If each Def can evaluate individual exposure

Denil v
Integrity Mut Ins Co
135 Wis. 2d 373
(Ct. App. 1986)

b. Multiple Defs, joint offer of judgment to one plaintiff

- Plaintiff can evaluate claim
- If Defs are jointly liable

Staehler v Beuthin
206 Wis. 2d 610
(Ct. App. 1996)

- If offer clear in requiring plaintiff to satisfy own claim and that of existing subrogee out of offer

Batteries Plus, Inc
v Mohr
2000 WI App 153
237 Wis. 2d 776
rev'd on other grounds
2001 WI 80
244 Wis. 2d 559

c. Applies to single plaintiff with "multiple claims," "causes of action," or "theories of relief" against single Def

2) Statutory provisions do not apply

White v General Cas Co
118 Wis. 2d 433
(Ct. App. 1984)
DeMars v LaPour
123 Wis. 2d 366 (1980)

a. Multiple plaintiffs, joint offer of settlement to single Def, or multiple Defs

- Tend to unreasonably force rather than encourage settlement

b. Single plaintiff, joint offer of settlement to multiple Defs

Smith v Keller
151 Wis. 2d 264
(Ct. App. 1989)

- If Defs are only severally liable

Wilber v Fuchs
158 Wis. 2d 158
(Ct. App. 1990)

- If Defs cannot evaluate individual exposure

Ritt v Dental Care Assocs
199 Wis. 2d 48
(Ct. App. 1995)

- If subrogated Def not specifically included in offer

DeWitt Ross & Stevens v Galaxy Gaming & Racing Ltd P'ship
2004 WI 92
273 Wis. 2d 577

c. Offer not effective unless all provisions could be judicially ordered

Lane v Williams
2000 WI App 263, ¶ 18
240 Wis. 2d 255

G. §

807.01 does not apply to arbitration cases

§ 814.10

4. Taxation of Costs

A. Objections to items of costs must be in writing and state reasons for objections

Milw Metro Sewerage Dist v City of Milw
2003 WI App 209, ¶ 31
267 Wis. 2d 688
aff'd on other grounds
2005 WI 8
277 Wis. 2d 635

1) Clerk of Ct notes which items are allowed and disallowed

2) Ten days after taxation, party or parties aggrieved by Clerk's allowance or disallowance may move Ct for review of Clerk's determination

Klein v. Dept of Revenue
2020 WI App 56, ¶ 33
394 Wis. 2d 66:

3) Unless authorized by statute, costs cannot be taxed against the State or an administrative agency under doctrine of sovereign immunity

B. Perfection of judgment by taxation of costs

§ 806.06(1)(c)

1) Judgment is perfected by taxation of costs and insertion in judgment

§ 806.06(4)

2) Party entitled shall perfect judgment within 30 days after entry of judgment or forfeit right to recover costs

§ 806.06(4)

3) Party against whom judgment is rendered may cause it to be entered

a. But party in whose favor judgment is entered must perfect it within 30 days after notice of entry of judgment or forfeit right to recover costs

Purdy v
Cap Gemini Am, Inc.
2001 WI App 270
248 Wis. 2d 804

b. When contractual Atty fees are recoverable in an action, they must be set and taxed within 30 days after rendition of judgment or they are waived

Soletski v
Krueger Int'l, Inc
2019 WI App 7, ¶ 35,
385 Wis. 2d 787

c. Prevailing party's timely filing of its bill of costs within 30 days after entry of judgment satisfies the time limit set forth in § 806.06(4)

§ 102.26(1)

C. Does not apply to Ch 102

Newman v
Piggie Park Enter
88 S. Ct. 964 (1968)
St ex rel Hodge
v Turtle Lake
180 Wis. 2d 62 (1993)
Richland Sch Dist
v DILHR
174 Wis. 2d 878,
908 (1993)
Watkins v LIRC
117 Wis. 2d 753,
765 (1984)

D. Actual costs allowed

1) Prevailing parties under Wis Open Meetings Law (Ch 19), Wis Fair Employment Act, Family or Medical Leave Act, and Civil Rights Act, entitled to reasonable Atty fees, absent special circumstances, when purpose for particular legislation advanced

a. Burden of fees on taxpayers alone not special circumstance that would disallow awarding Atty fees

b. Presence of good faith alone not enough to constitute special circumstance that would disallow awarding Atty fees

CV 24: FRIVOLOUS ACTIONS

1. Damages for Maintaining Frivolous Claims

§ 895.044(1)

A. Party or party's Atty may be liable for costs and Atty fees for commencing, using, or continuing action, special proceeding, counterclaim, defense, cross-complaint, or appeal to which any of the following applies:

1) Pursued in bad faith, solely for purpose of harassing or maliciously injuring another

2) Party or Atty knew or should have known there was no reasonable basis in law or equity, not support in good-faith argument for an extension, modification, or reversal of existing law

§ 895.044(7)

B. Section 895.044 does not apply to

1) Criminal actions or civil forfeiture actions or appeals of such actions

2) Appeals from termination of parental rights, from mental or sexual predator commitments, from guardianships or protective placements, or from proceedings under Children's Code or Juvenile Justice Code

§ 895.044(2)

C. Motion may be made at any time during the proceedings or upon judgment

§ 895.044(3)

D. Motion and hearing notice must be served on *unrepresented* party by personal service or registered mail only

§ 895.044(2)

E. Violation must be proved by clear and convincing evidence

§ 895.044(2)

F. Available remedies upon proven violation

1) If the offending party withdraws, or appropriately corrects action, special proceeding, counterclaim, defense, or cross-complaint within 21 days after service of motion (or such other time as Ct may set), Ct *may* award actual costs incurred as a result of violation, including reasonable Atty fees incurred (including fees incurred to pursue motion)

2) If offending party does not take such timely corrective action, Ct *shall* award such actual costs and Atty fees

§ 895.044(4)

G. If award is upheld on appeal, on remand, Trial Ct must award actual reasonable Atty fees incurred by successful party on appeal

§ 895.044(6)

H. Award may be assessed fully against party or Atty, or against both, jointly and severally or by apportionment

2. Signatures and Representations to Court

A. Signature

§ 801.18(12)

1) Electronic signatures or handwritten signatures are acceptable as set forth in § 801.18(12)

§ 802.05(1)
Rabideau v Stiller
2006 WI App 155, ¶ 18
295 Wis. 2d 417

2) Unsigned pleading stricken unless omission promptly corrected

B. Certification

§ 802.05(2)(a)

1) Pleading not presented for improper purpose

Pacific Dunlop Holdings v Barosh, 22 F3d 113, 118 (7th Cir 1994)

a. Standard is objective

Vollmer v Selden
350 F3d 656, 659
(7th Cir 2003)

b. List of improper purposes in § 802.05(2)(a) is illustrative only

§ 802.05(2)(b)

2) Claims, defenses, and legal contentions warranted by existing law or reasonable modification

Harlyn Sales Corp Profit Sharing Plan v Kemper Fin Servs, Inc
9 F3d 1263, 1270
(7th Cir 1993)

a. Failure to state a claim does not equate to finding action frivolous

Swartwout v Bilsie (In re Est of Bilsie)
100 Wis. 2d 342, 355
(Ct. App. 1981)

b. Conversely, denial of motion to dismiss or summary judgment may not, of itself, render surviving claim not frivolous

Modrow v Modrow
2001 WI App 200, ¶ 29
247 Wis. 2d 889

c. Case might not be frivolous if it is one of first impression

§ 802.05(2)(c)
Belich v Szymaszek
224 Wis. 2d 419, 430–34
(Ct. App. 1998)

3) Factual contentions have evidentiary support or are likely to after discovery

a. Must affirmatively validate client's story so it "passes the smell test"

b. Reasonableness of inquiry involves consideration of seriousness of case, time available to Atty, nature/complexity of facts and extent to which Atty must rely on client for underlying facts, whether case accepted from another Atty, and whether discovery promptly undertaken

c. Not required to take steps that are not cost-effective or are unlikely to produce results

§ 802.05(2)(d)

4) Denials of factual contentions have evidentiary support

NOTE: The Wisconsin Supreme Court adopted the current version of FRCP 11 as § 802.05, effective 7/1/2005. Wis. Sup. Ct. Order 03-06, 2005 WI 38, 2005 WI 86. In its Comments to the revised rule, the Ct stated that it intended to provide Wisconsin Cts with additional tools to deal with frivolous filings and that Judges will be able to "look to applicable decisions of federal Cts since 1993 for guidance in the interpretation and application of the mandates of FRCP 11." Consequently, CV 24 incorporates significant federal decisions, particularly those that address new provisions and the current emphasis on deterrence.

3. Purposes for Section 802.05

§ 802.05(3)(b)
Trinity Petroleum, Inc
v Scott Oil Co
2007 WI 88, ¶ 47,
302 Wis. 2d 299
Divane v Krull Elec Co
319 F3d 307, 314
(7th Cir 2003)
Stoll v Adriansen
122 Wis. 2d 503
(Ct. App. 1984)

A. Deterrence is now the primary purpose. *See infra* Sec. 6.B.2)

§ 802.05(3)(b)

Sanction must be limited to what is sufficient to deter repetition

§ 802.05(3)(a)

B. Compensation "may" be awarded

Trinity Petroleum, Inc
v Scott Oil Co
2007 WI 88, ¶ 28,
302 Wis. 2d 299
Jandrt v
Jerome Foods, Inc

227 Wis. 2d 531,
577 (1999)

1) Subject to **Sec. 3.A.** above, compensation may be awarded for reasonable expenses and Atty fees

Stivarius v DiVall
117 Wis. 2d 62
(Ct. App. 1983)
rev'd on other grounds
121 Wis. 2d 145

2) Evidence must be offered of the amount of fees claimed

Lucareli v Vilas Cty
2000 WI App 157, ¶ 12
238 Wis. 2d 84

a. Absent material issue of fact as to reasonableness of fees, Ct need not hold evidentiary hearing

Finance Inv Co
v Geberit AG
165 F3d 526
534 (7th Cir 1998)

b. When award is significant, Ct should specifically describe its calculations

Jimenez v MATC
321 F3d 652, 657
(7th Cir 2003)

C. Punishment

Trinity Petroleum, Inc
v Scott Oil Co
2007 WI 88, ¶ 47,
302 Wis. 2d 299

D. To maintain integrity of judicial system and legal profession

4. Initiating Section 802.05 Motion for Sanctions

§ 802.05(3)(a)1.

A. Notice by parties

Ardisam, Inc v
Ameristep, Inc
343 F Supp 2d 726, 732
(WD Wis 2004)

1) Must be by separate motion

2) Motion must be served as provided by § 801.14

3) Motion must specifically describe frivolous conduct

Trinity Petroleum, Inc
v Scott Oil Co
2007 WI 88, ¶ 27,
302 Wis. 2d 299

4) Safe-harbor provisions—motion "shall not" be filed until 21 days after service

Corley v
Rosewood Care Ctr, Inc
142 F3d 1041, 1058
(7th Cir 1998)

a. Motion filed before 21-day safe-harbor period should be rejected

b. Generally, informal notice will not trigger 21-day period

Nisenbaum v
Milwaukee Cty
333 F3d 804, 808
(7th Cir 2003)

- But substantial compliance found when parties sent letter rather than motion

B. Notice by Court

§ 802.05(3)(a)2.

1) Notice to the parties by an order to show cause

2) Must also specifically describe conduct at issue

C. When available

Sullivan v Hunt
350 F3d 664, 666
(7th Cir 2003)

1) Should be brought promptly after challenged conduct occurs

Divane v Krull Elec Co
200 F3d 1020, 1025
(7th Cir 1999)

2) May be available postjudgment or after other ruling by Ct, provided motions served on party at least 21 days before dismissal or ruling

D. When not available

§ 802.05(5)

1) To discovery requests

2) Against frivolous appeals

Puchner v Hepperla
2001 WI App 50
241 Wis. 2d 545

Ct of Appeals determines if appeal frivolous as a matter of law, and Trial Ct determines amount of award

3) In criminal proceedings

City of Janesville
v Wiskia

97 Wis. 2d 473 (1980)

4) In quasi-criminal proceedings

Hessenius v Schmidt
102 Wis. 2d 697 (1981)

5) Before Ct Comm'rs

Tatum v LIRC
132 Wis. 2d 411
(Ct. App. 1986)

6) Before administrative agency

Gagnow v Haase
149 Wis. 2d 542, 546
(Ct. App. 1989)

7) Statute directed against lawsuit, not tactics of Atty vis-à-vis nonfrivolous lawsuit

Trinity Petroleum, Inc
v Scott Oil Co
2007 WI 88, ¶ 100
302 Wis. 2d 299

E. Retroactive application

1) Section 802.05 applies retroactively (before July 1, 2005) except when the new rule:

a. Diminishes a contract

b. Disturbs vested rights, or

c. Imposes an unreasonable burden on party charged with complying with the new rule's requirements

5. Opportunity to Respond

A. Hearing discretionary

Sommer v Carr
99 Wis. 2d 789 (1981)

1) Not necessary if record is adequate

Sommer v Carr
99 Wis. 2d 789 (1981)

2) Affidavits may suffice

Wis Chiropractic Ass'n
v Wis Chiropractic
Exam'g Bd
2004 WI App 30, ¶ 25
269 Wis. 2d 837

3) Inquiry must focus on factual allegations and legal theory in complaint, not on unpleaded theory

Keller v Patterson
2012 WI App 78, ¶ 22

343 Wis. 2d 569

4) All doubts regarding whether a claim is frivolous are to be resolved in favor of the party or Atty who it is claimed commenced or continued a frivolous action

5) Apparent state and federal conflict

Wis Chiropractic Ass'n
v Wis Chiropractic
Exam'g Bd
2004 WI App 30, ¶ 21
269 Wis. 2d 837

a. State: Ct must hold evidentiary hearing to resolve disputed factual issues

Consolidated Doors, Inc
v Mid-America Door Co
120 F Supp 2d 759, 768
(ED Wis 2000)

b. Federal: Ct need not conduct mini-trial to determine if party conducted reasonable inquiry before filing suit, and

Consolidated Doors, Inc
v Mid-America Door Co
120 F Supp 2d 759, 768
(ED Wis 2000)

c. Goal of deterring baseless filings tempered by concern for proliferating satellite litigation

Recommendation

Follow the rule in *Chiropractic Ass'n* rather than the federal cases. Although the Wisconsin Supreme Court's comments to § 802.05 state that federal cases may be looked at for guidance, the Wisconsin Supreme Court has not overruled *Chiropractic Ass'n*.

6. Sanctions

§ 802.05(3)(c)
Katz v
Household Int'l, Inc
36 F3d 670, 673
(7th Cir 1994)
Swartwout v Bilsie
(In re Est of Bilsie)
100 Wis. 2d 342, 354–55
(Ct. App. 1981)

A. Order awarding sanctions must make specific findings

§ 802.05(3)
Fries v Helsper
146 F3d 452, 459
(7th Cir 1998)

B. Ct has broad discretion

OLR v Eisenberg (In re
Disciplinary Proceedings
Against Eisenberg)
2010 WI 11
322 Wis. 2d 518

1) Violation must be proved by clear and convincing evidence

Keller v Patterson
2012 WI App 78, ¶ 22
343 Wis. 2d 569

All doubts resolved in favor of party accused of frivolous conduct

See Divane v
Krull Elec Co
200 F3d 1020, 1030
(7th Cir 1999)

2) Sanction should be least severe capable of serving deterrent purpose of § 802.05

5A Wright & Miller,
Federal Practice &
Procedure
§ 1336.3
(4th ed 2018)

a. Rule envisions public interest remedies such as fines and reprimands and only in unusual circumstances money awarded to opponent

5A Wright & Miller,
supra, § 1336.3

b. Contemplates nonmonetary sanction, such as reprimands, orders to undergo CLE, circulating § 802.05 rulings throughout law firm, referral to disciplinary bodies, and compelling Atty to take pro bono case

Jimenez v MATC
321 F3d 652, 657
(7th Cir 2003)

c. Dismissal with prejudice, and monetary and other punitive sanctions, reserved for fraud, contempt, or bad faith

3) Ct may deny sanctions

Corley v
Rosewood Care Ctr, Inc
388 F3d 990, 1013
(7th Cir 2004)
Brunt v Service
Employees Int'l Union
284 F3d 715, 721
(7th Cir 2002)

a. Discretion to deny sanctions upheld even when claim is described as "not so frivolous" or groundless

In re Wal-Mart
Employee Litigation
271 F Supp 2d 1080,
1085–86 (ED Wis 2003)

b. Award of fees and costs in fee-shifting statute may be regarded as alternative to sanctions

See 5A Wright & Miller,
supra, § 1332

c. Concerns about chilling interest in innovative lawsuits may support denial of sanctions

§ 802.05(3)

4) Ct may sanction Attys, law firms, or parties

§ 802.05(3)(a)1.

a. Absent exceptional circumstances, law firm shall be held jointly responsible for violations

5A Wright & Miller,
supra, § 1336.2

b. Imposing sanctions on only Atty may be appropriate when conduct is beyond client's competence and client is unaware. Party who has signed pleadings may be sanctioned along with Atty

Business Guides Inc v
Chromatic Commc'ns
Enters, Inc
111 S. Ct. 922, 929, 933
(1991)

5) Pro se litigants required to meet same standards as Attys and represented litigants

C. Limits on award of sanctions

§ 802.05(3)(b)1.

1) Monetary sanctions may not be awarded against a party who is represented for a § 802.05(2)(b) violation

§ 802.05(3)(b)2.

2) Sanctions based on Ct's motion may not include monetary sanction unless order to show cause issued before voluntary dismissal or settlement

D. Factors bearing on sanctions

Wis Sup Ct Order 03-06,
2005 WI 38—cmt to
802.05(3)

1) Whether the conduct was part of a pattern

2) Whether the conduct infected the entire pleading

3) Whether the Atty or party engaged in similar conduct in other litigation

5A Wright & Miller,
supra, § 1336.1

4) Other factors

Berwick Grain Co v
Illinois Dept of Agric
217 F3d 502, 506
(7th Cir 2000)

E. Party seeking sanctions has duty to mitigate its costs and fees

CV 25: JUDGMENTS/RELIEF FROM JUDGMENT

JUDGMENTS

§ 806.01(1)(a)
Booth v
Am States Ins Co
199 Wis. 2d 465
(Ct. App. 1996)

1. Judgment Is the Determination of the Action

§ 806.01(1)(b)

A. Specifies relief granted or other determination

§ 806.01(1)(c)

1) If no answer, relief cannot exceed demand of the complaint

2) If money sought is excluded from complaint as required by § 802.02(1m), plaintiff must specify amount and provide information to Ct and parties before judgment

B. Name and place of residence of each party to the action must be included

Booth v
Am States Ins Co
199 Wis. 2d 465
(Ct. App. 1996)

C. In special proceedings, the determination is an order

2. Judgment May Be Final, Interlocutory, or Partial

A. Final judgment or order

Wambolt v West Bend
Mut Ins Co
2007 WI 35, ¶ 50
299 Wis. 2d 723

1) Shall contain a statement on the face of the document that it is final for the purpose of appeal

Wambolt v West Bend
Mut Ins Co
2007 WI 35, ¶¶ 27, 30
299 Wis. 2d 723

2) Regardless of label, terminates litigation on the merits as to one or more parties

a. Resolves all issues of substantive law

b. Intended to be last document in litigation

Thomas/Van Dyken Jt
Venture v Van Dyken
90 Wis. 2d 236 (1979)

B. Interlocutory judgment substantially disposes of merits of controversy but leaves a ministerial fact-finding function remaining

1) Account to be taken, or

2) Condition to be performed

§ 806.01(2)

C. Partial judgment involves one or more of several parties

1) May dismiss as to others

2) May proceed on merits against others

§ 806.02

3. Default Judgments

A. Party entitled to default judgment if no responsive pleadings within time allowed by law

Hollingsworth v
Am Fin Corp
86 Wis. 2d 172 (1978)

1) BUT, a matter for exercise of Ct's discretion

Shirk v Bowling, Inc
2001 WI 36
242 Wis. 2d 153

2) Ct may use grounds under § 806.07 preemptively to deny motion for default judgment

§ 806.02(1)

B. Default judgment may be rendered if

1) No issue of law or fact has been joined, and

2) Time for joining issue has expired, and

3) Ct has jurisdiction

Est of Otto v
Physicians Ins Co of Wis
2008 WI 78, ¶ 13,
311 Wis. 2d 84

Co-Def insureds' timely answers denying liability do not inure to benefit of insurer who has not answered timely

§ 804.12(2)(a)

4) Failure to comply with discovery order

Holman v
Fam Health Plan
227 Wis. 2d 478 (1999)

5) BUT, may not be entered on superseded complaint

§ 806.02(3)

C. If Def fails to appear within time fixed in § 801.09, Ct shall require proof of service of summons as required by § 801.10 before entering judgment

§ 806.02(3)(a)

1) If a personal claim is made, Ct shall require that proof by affidavit or other evidence be made if complaint insufficient to show grounds for personal jurisdiction

§ 806.02(3)(b)

2) If no personal claim made, Ct shall require proof by affidavit or otherwise to show jurisdiction over status, property, or thing that is subject of the action

§ 806.02(5)

D. Default judgment may be rendered against any party who has appeared in the action but who fails to appear at trial

Heggy v Grutzner
156 Wis. 2d 186
(Ct. App. 1990)

E. Issue preclusion (collateral estoppel) can apply to facts found in default judgment

§ 806.02(1)

F. Default-judgment statute is available to parties on counterclaim and cross-claim effective January 1, 2019

G. Procedure for entry of default judgment by Ct

§ 806.02(2)

1) Party seeking a default judgment must move for default judgment

§ 806.02(1)

a. If Def has appeared, notice of motion for judgment must be given

Hansher v Kaishian
79 Wis. 2d 374, 388
(1977)

b. If Def has not appeared, Ct has discretion to require notice of motion be given

Keene v Sippel
2007 WI App 261, ¶ 16
306 Wis. 2d 643

2) If answer filed late, plaintiff must move to strike, unless Ct has denied a motion to enlarge time

Connor v Connor
2001 WI 49, ¶ 21
243 Wis. 2d 279

a. Courtesy agreements to extend time for answering need not be written, but good practice is to put in writing

Johnson Bank v Brandon Apparel Grp, Inc.
2001 WI App 159,
¶¶ 1, 16
246 Wis. 2d 828

b. When factual dispute as to existence or terms of a courtesy agreement, evidentiary hearing necessary

Est of Otto v Physicians Ins Co of Wis

2008 WI 78, ¶¶ 114–117,
311 Wis. 2d 84

3) Motion to enlarge time to file answer

a. Standards for granting motion to enlarge answer are excusable neglect and prejudice

b. Consider prejudice only if excusable neglect found

§ 806.02(2)

4) Affidavit of default must be on file

5) Determine whether proof of service on party against whom judgment is sought has been filed

§ 806.02(3)

6) Determine whether Ct has jurisdiction

Honeycrest Farms, Inc
v AO Smith Corp
169 Wis. 2d 596
(Ct. App. 1992)

Party can challenge proof of service at default judgment hearing

50 USC § 3931
RMC Form GF-175

7) Determine whether declaration of nonmilitary service has been filed for individual Def

§ 806.02(2)

8) Check complaint, counterclaim, or cross-claim to determine whether additional proof required before judgment can be rendered

§ 806.02(2), (5)
Sibley v Weinberg
116 Wis. 1, 4 (1902)

a. If Ct required to exercise discretion in granting judgment, additional proof may be required

- Example: Determining damages for personal-injury or other unliquidated damages claim

- Example: Fixing period of redemption in land contract foreclosure

b. Proof may be made in open Ct or by affidavit

Smith v Golde
224 Wis. 2d 518
(Ct. App. 1999)

c. If hearing held, Def may appear, cross-examine plaintiff's witnesses, and present evidence on damages

Rao v WMA Sec, Inc
2008 WI 73, ¶ 55,
310 Wis. 2d 623

d. Right to jury trial waived on issue of damages if default judgment results from discovery order sanction

§ 806.02(2)

9) Judgment cannot exceed demand of the complaint, counterclaim, or cross-claim

Rao v WMA Sec, Inc
2008 WI 73, ¶ 65,
310 Wis. 2d 623
Stein v Illinois St
Assistance Comm'n
194 Wis. 2d 775 (1995)

10) Punitive damages cannot be awarded unless demand in complaint, and Ct must give complaining party opportunity to prove facts supporting punitive damages claim

Apex Elecs Corp v Gee
217 Wis. 2d 378, 390
(1998)

Ct entering a default judgment on a punitive damages claim must make inquiry beyond the complaint to determine the merits of the punitive damages claim and the amount of punitive damages, if any, to be awarded

§ 802.02(1m)

11) If amount of money sought involved a tort claim and was excluded from demand for judgment, before Ct can render judgment, plaintiff must

a. Specify amount claimed

b. Provide Ct and other parties with evidence of amount claimed

H. Entry of default judgment by Clerk of Ct

§ 806.02(4)

1) Default judgment may be rendered by Clerk of Ct ONLY in an action on express contract for recovery of a liquidated amount of money

See **Judgment on Admitted Claim**, **Sec. 4**, *infra*

§ 806.02(4)

2) Plaintiff must file following with Clerk of Ct

a. Summons and complaint

b. Affidavit that Def is in default for failure to join issue

c. Proof of personal service of summons

- Substituted service is not personal service under § 806.02(4)

§ 814.04(6)

I. Costs

If default judgment, Atty fees ½ statutory amount

4. Judgment on Admitted Claim

§ 806.03
EC Styberg Eng'g Co v Consumer Steel & Supply Co
118 Wis. 2d 85
(Ct. App. 1984)

A. Action on express contract for liquidated sum—Alternatives

1) Clerk grants judgment for admitted amount or the amount less counterclaim as a final judgment

   a. Answer admits any part of plaintiff's claim, or

   b. Counterclaim asserted for an amount less than plaintiff's claim and no other defense asserted

2) Ct, on motion, orders Def to satisfy part of claim, and remainder proceeds to trial

   a. When Def admits part of claim as just

§ 806.06

5. Rendition, Perfection, and Entry of Judgment

A. Judgment rendered when signed

1) By Judge

2) By clerk at Judge's written direction (order)

B. Judgment entered when filed in Clerk of Ct's office

§ 806.06(3)

1) Either party may file notice of entry of judgment

   a. Must contain date of entry of judgment

§ 806.06(5)

   b. Must be "given" within 21 days after entry

Soquet v Soquet
117 Wis. 2d 553, 557
(1984)

- "Given" is synonymous with "served"

2) Notice of entry reduces time for appeal from 90 days to 45 days under § 808.04(1)

Weina v
Atlantic Mut Ins Co
177 Wis. 2d 341
(Ct. App. 1993)

a. If accurate date of entry inserted

Nichols v Conlin
198 Wis. 2d 287
(Ct. App. 1995)

b. If notice mailed to correct address

§ 806.10
South Milw Sav Bank
v Barrett
2000 WI 48
234 Wis. 2d 733

3) Judgment must be docketed immediately upon entry if fee paid

C. Judgment perfected by taxation of costs and amount inserted in judgment

§ 806.06(4)

1) Judgment may be rendered and entered at the instance of either party before or after perfection

a. Successful party has 30 days to enter and perfect the judgment or forfeit costs

Purdy v
Cap Gemini Am, Inc.
2001 WI App 270
248 Wis. 2d 804

- Costs include Atty fees

b. If unsuccessful party causes judgment to be entered, successful party must perfect judgment within 30 days after service of notice of entry or forfeit recovery of costs

c. If proceedings are stayed under § 806.08, judgment may be perfected within 30 days after expiration of stay

Fredrick v
City of Janesville
91 Wis. 2d 572
(Ct. App. 1979)
rev'd on other grounds
92 Wis. 2d 685 (1979)

d. No execution on the judgment can issue until judgment perfected or time for perfection expired

- Unless party seeking execution waives costs in writing

D. Judgment granted when given orally in open Ct on the record

RELIEF FROM JUDGMENT

Schwochert v
Am Fam Mut Ins Co
172 Wis. 2d 628 (1993)

1. Purpose and Standard

A. To achieve balance between finality and fairness

Connor v Connor
2001 WI 49, ¶ 28
243 Wis. 2d 279

B. Remedial and liberally construed

Comment
§ 801.15(2)(a)
Hedtcke v Sentry Ins Co
109 Wis. 2d 461 (1982)

Be aware of line of cases in which statute seems to be strictly construed

C. Discretionary determination

2. Grounds

Bank One Wis v Kahl
2002 WI App 312, ¶ 15
258 Wis. 2d 937

A. Ct may relieve party or legal representative, including a prevailing party, from judgment, order, or stipulation for the following reasons

§ 806.07(1)(a)
Hollingsworth v
Am Fin Corp
86 Wis. 2d 172, 187 (1978)
Schauer v DeNeveu
Homeowner's Ass'n
187 Wis. 2d 32
(Ct. App. 1994)
aff'd, 194 Wis. 2d 62
(1995)

1) Mistake, inadvertence, surprise, or excusable neglect

Gerth v Am Star Ins Co
166 Wis. 2d 1000
(Ct. App. 1992)

a. Test: Reasonably prudent person under same circumstances

b. Not synonymous with neglect, carelessness, or inattentiveness

JL Phillips & Assocs
v E&H Plastic Corp
217 Wis. 2d 348 (1998)

c. Also requires showing of a meritorious defense

- Meritorious defense is one sufficient to survive a motion for judgment on the pleadings

- Likelihood of success is not measured

Milwaukee Women's Med Serv v Scheidler
228 Wis. 2d 514
(Ct. App. 1999)

d. Mistake justifying relief under § 806.07(1)(a) must be based on fact, not law

- Fact must be historical fact, not future fact

Est of Otto v Physicians Ins Co of Wis
2008 WI 78, ¶¶ 114–117,
311 Wis. 2d 84

e. Consider interests of justice only if excusable neglect found

Sands v Menard, Inc
2013 WI App 47
347 Wis. 2d 446

f. Mistake or newly discovered evidence can be grounds to reopen judgments confirming arbitration awards

§ 806.07(1)(b)

2) Newly discovered evidence that entitled party to new trial under § 805.15(3), provided Ct finds

§ 805.15(3)(a)

a. Evidence has come to moving party's notice after trial, and

§ 805.15(3)(b)

b. Moving party's failure to discover evidence earlier did not arise from lack of diligence in seeking to discover it, and

§ 805.15(3)(c)

c. Evidence is material and not merely cumulative, and

§ 805.15(3)(d)

d. New evidence would probably change result

§ 806.07(1)(c)

3) Fraud, misrepresentation, or other misconduct of adverse party

§ 806.07(1)(d)

4) Judgment is void

Village of Trempealeau v Mikrut
2004 WI 79, ¶ 34
273 Wis. 2d 76

However, lack of competency to proceed, if waived, does not void judgment

§ 806.07(1)(e)

5) Judgment has been satisfied, released, or discharged

§ 806.07(1)(f)

6) Prior judgment on which judgment is based has been reversed or otherwise vacated

Gamroth v
Village of Jackson
215 Wis. 2d 251
(Ct. App. 1997)

Includes functional reversal of prior case

§ 806.07(1)(g)

7) No longer equitable that judgment should have prospective application

Nelson v Taff
175 Wis. 2d 178
(Ct. App. 1993)

a. Only applies to equitable actions

Connor v Connor
2001 WI 49, ¶ 40
243 Wis. 2d 279

b. Contemplates change in circumstances from time of judgment

§ 806.07(1)(h)
Sukala v
Heritage Mut Ins Co
2005 WI 83, ¶¶ 11–13
282 Wis. 2d 46

8) Any other reasons justifying relief from operation of judgment

Nelson v Taff
175 Wis. 2d 178
(Ct. App. 1993)

a. Interests of justice require extraordinary circumstances that are relevant to competing interests of finality of judgments and relief from unjust judgments

Miller v Hanover Ins Co
2010 WI 75, ¶ 36
326 Wis. 2d 640

b. 5 factors used to determine whether extraordinary circumstances exist to justify grant of relief from default judgment in interest of justice are:

- Whether judgment was result of claimant's conscientious, deliberate, and well-informed choice
- Whether claimant received effective assistance of counsel
- Whether relief is sought from judgment in which there has been no judicial consideration of the merits, and interest of deciding particular case on merits outweighs finality of judgments
- Whether there is a meritorious defense to the claim, and
- Whether there are intervening circumstances making it inequitable to grant relief

3. Procedure

§ 806.07(1)

A. Motion made to Ct granting judgment or order

§ 806.07(2)

1) Motion must be made within a reasonable time

§ 806.07(2)

a. Within one year after judgment was entered or order or stipulation was made, if motion based on

- Mistake, inadvertence, surprise, or excusable neglect, or
- Fraud, misrepresentation, or other misconduct of adverse party

Miro Tool & Mfg v Midland Mach 205 Wis. 2d 650 (Ct. App. 1996)

- One year cannot be tolled or extended if based on above grounds

§ 806.07(2)
§ 805.16(4)

b. Within one year after verdict, if motion based on newly discovered evidence

Neylan v Vorwald 124 Wis. 2d 85 (1985)

c. Reasonable time requirement does not apply to void judgments

Village of Trempealeau v Mikrut 2004 WI 79 273 Wis. 2d 76
West v West 82 Wis. 2d 158 (1978)
Tridle v Horn 2002 WI App 215 257 Wis. 2d 529

- May be vacated at any time
- Cannot be validated by consent, ratification, waiver, or estoppel

2) Determination of whether time reasonable

State ex rel Cynthia MS v Michael FC 181 Wis. 2d 618, 632 (1994)

a. Not subject to bright-line rule

Bank One Wis v Kahl 2002 WI App 312,

¶¶ 17–18
258 Wis. 2d 937

b. Ct may consider factors that justify relief on merits and fault of moving party

Hutjens v Hutjens
2002 WI App 162, ¶ 29
256 Wis. 2d 255

c. Ultimate inquiry is whether length of time is so great that interest in finality of judgment outweighs interest in reopening

Sukala v
Heritage Mut Ins Co
2005 WI 83, ¶ 10
282 Wis. 2d 46

3) Hearing necessary if facts as alleged may warrant relief sought

Connor v Connor
2001 WI 49, ¶ 38
243 Wis. 2d 279

Evidentiary hearing required if facts are disputed

Richards v
First Union Sec
2006 WI 55, ¶ 27
290 Wis. 2d 620
Connor v Connor
2001 WI 49, ¶ 28
243 Wis. 2d 279

4) Burden of proof is on the party seeking relief from judgment

§ 806.07(1)

5) Judge may set conditions on reopening that are fair

Larry v Harris
2008 WI 81, ¶¶ 20–25,
311 Wis. 2d 326

B. By Ct, sua sponte, with notice to parties and opportunity to be heard

Larry v Harris
2008 WI 81, ¶ 27,
311 Wis. 2d 326

Opportunity to be heard may be fulfilled by reconsideration

§ 806.07(2)

C. Independent equitable action

Walker v Tobin
209 Wis. 2d 72
(Ct. App. 1997)

1) Not regarded with favor and only available in exceptional cases

Suburban Motors
v Forester
134 Wis. 2d 183, 187
(Ct. App. 1986)

2) Time for filing governed by doctrine of laches

Dekker v Wergin
214 Wis. 2d 17
(Ct. App. 1997)

3) Plaintiff must have acted seasonably and come to Ct with clean hands

4. Limitations

§ 806.07(2)

A. Motion under § 806.07 does not affect finality of judgment or suspend its operation

Charter Mfg v Milw River Restoration Council
102 Wis. 2d 521, 523
(Ct. App. 1981)

B. Relief from judgment entered in Ch 227 review may not be granted under § 806.07

Manly v St Farm Fire & Cas Co
139 Wis. 2d 249
(Ct. App. 1987)

C. Does not apply to setting aside verdict

5. Relief Pending Appeal

Faust v Faust
178 Wis. 2d 599
(Ct. App. 1993)
overruled in part by
St v Gudenschwager
191 Wis. 2d 431 (1995)

A. Motion for stay of enforcement pending appeal must be supported by specific facts through affidavit

St v Gudenschwager
191 Wis. 2d 431 (1995)

Reviewed under erroneous exercise of discretion standard

Leggett v Leggett
134 Wis. 2d 384
(Ct. App. 1986)

B. Trial Ct may issue stay of enforcement of a judgment pending appeal upon consideration of following factors (*See also* Sec. C., *infra*, for considerations specific to stay of solely a money judgment)

1) Likelihood party seeking stay will prevail on merits of appeal

Waity v Lemahieu
2022 WI 6, ¶¶ 49–61
400 Wis. 2d 356

a. Movant must make a strong showing that it is likely to succeed on the merits on appeal

b. Circuit Ct should consider standard for appellate review, along with the possibility that appellate courts may reasonably disagree with its legal analysis

2) Likelihood that moving party will be irreparably harmed without a stay

Economic loss alone does not constitute irreparable harm

3) Prospect that, if stay granted, others will not be substantially harmed during the pendency of the stay

4) Public interest in granting or denying stay

St v Gudenschwager
191 Wis. 2d 431 (1995)

5) Factors are not prerequisites but are interrelated considerations to be balanced

Scullion v WP&L
2000 WI App 120
237 Wis. 2d 498

C. Trial Ct may issue stay of enforcement of solely a money judgment pending appeal upon consideration of following nonexclusive factors

1) Likelihood that party seeking stay will prevail on the merits of the appeal

a. Must be more than mere possibility

Scullion v WP&L
2000 WI App 120
237 Wis. 2d 498

b. Should consider standard for appellate review

2) Need to ensure collectibility of judgment plus interest if appeal unsuccessful

Addresses appellant's ability to file undertaking or to be "good" for amount owed

3) Ability of appellant, if successful, to recover money paid and time and effort to do so

Scullion v WP&L
2000 WI App 120
237 Wis. 2d 498

Inability to recover money need not constitute irreparable harm

4) Extent of harm to respondent if judgment not paid until completion of appeal

5) Public interest in granting or denying stay

§ 808.07(3)

D. Undertaking for costs not generally required unless specifically required by statute or by Trial Ct acting in its discretion

§ 655.27(5)(a)3.

Ct may not order an undertaking for any injured patients and families compensation fund reviews